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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 17

ALEXANDER BOYD, PETITIONER,

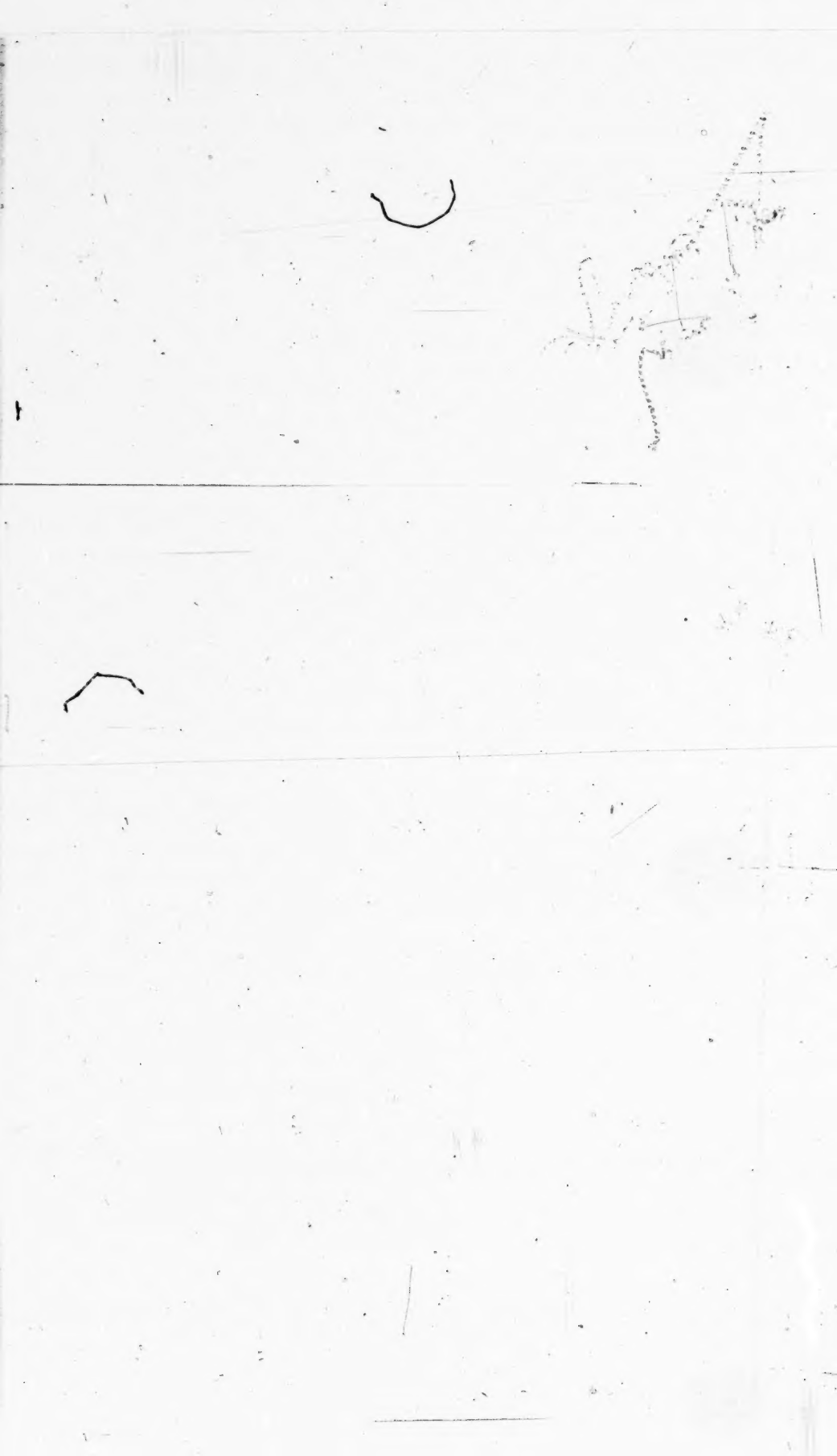
vs.

GRAND TRUNK WESTERN RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI FILED DECEMBER 29, 1948.

CERTIORARI GRANTED JUNE 6, 1949.



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GRAND TRUNK WESTERN RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 30, 1949.

—3169

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[fol. 1] [Stamp:] Supreme Court, U. S. Office of the Clerk. Nov. 20, 1948.

43966

Parties: Grand Trunk Western Railroad Company, Plaintiff and Appellant, vs. Alexander Boyd, Defendant.

Plaintiff's Attorneys: George F. Gronewold, Battle Creek.

Defendant's Attorneys, Mechem & Mechem, Battle Creek.

Appeal from Calhoun, in Chancery.

Date	Proceedings
1947	
Nov. 4.	Motion to continue injunction filed.
Nov. 14.	Brief in opposition filed.
Dec. 2.	Restraining order issued.
1948	
Jan. 28.	Record on appeal filed.
Mar. 9.	Note of argument filed.
Apr. 9.	Argued and submitted.
June 29.	Reversed, remanded, no costs.
July 2.	Record returned to Court below.
Aug. 3.	Motion for rehearing submitted.
Oct. 4.	Motion for rehearing denied, costs to plaintiff.
Oct. 12.	Motion for stay of proceedings filed.
Oct. 21.	Motion for stay granted.

[fol. 2] STATE OF MICHIGAN, IN THE SUPREME COURT

Cal. No. 43966

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

GRAND TRUNK WESTERN RAILROAD COMPANY, A Michig[illegible] Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

NOTICE OF HEARING

To: Mechem and Mechem, Melvin L. Griffith, and Walter N. Murray.

Please take notice, that the within Motion to Continue Injunction will be brought on for hearing before the Supreme Court, on the 18th day of November, A. D. 1947, at the opening of Court, or as soon thereafter as counsel may be heard.

Dated: November 18, 1947.

By George F. Gronewold, Attorney for Plaintiff and Appellant.

To: Jay Mertz, Clerk of said Court.

SIR:

Will you please place the within motion on the Docket of this Court for the above specified day.

By George F. Gronewold, Attorney for Plaintiff and Appellant. Business address: 1514 Security National Bank Bldg., Battle Creek, Michigan.

[fol. 3] STATE OF MICHIGAN, IN THE SUPREME COURT

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

GRAND TRUNK WESTERN RAILROAD COMPANY, A Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

PROOF OF SERVICE

COUNTY OF CALHOUN, ss:

George F. Gronewold, being duly sworn, deposes and says that on the 3rd day of November, 1947, at the City of Battle Creek, Michigan, he served a true copy of the attached Notice of Hearing, Motion to Continue Injunction, and Affidavit upon Mechem and Mechem, attorneys for the defendant and appellee in the above entitled cause by handing the said to John Leland Mechem personally, one of the members of said firm; that deponent also served a true copy of the attached Notice of Hearing, Motion to Continue Injunction, and Affidavit upon Melvin L. Griffith and Walter N. Murray by depositing the same in a Government mail receptacle in the City of Battle Creek, Calhoun County, Michigan, enclosed in a sealed envelope, plainly addressed to such attorneys with postage therein fully paid, addressed to their business address at 139 Clark Street, North, Chicago, Illinois, on the 3rd day of November, 1947.

George F. Gronewold.

Subscribed and sworn to before me, a Notary Public, this 3rd day of November, 1947. Kenneth P. Williams, Notary Public, Calhoun County, Michigan. My Commission expires May 20, 1950.

[fol. 4] STATE OF MICHIGAN, IN THE SUPREME COURT

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Cal. No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, A Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

MOTION TO CONTINUE INJUNCTION

Now comes the plaintiff and appellant in the above entitled cause, Grand Trunk Western Railroad Company, and respectfully moves the Court now here to enter an order continuing the injunction issued by the lower court restraining the defendant and appellee from in any manner in assisting, aiding, participating, or engaging directly or indirectly in the prosecution or conduct of the cause of action now pending in the Superior Court of Cook County, Illinois, wherein Alexander Boyd is plaintiff and Grand Trunk Western Railroad Company is defendant being Docket No. 47S10416, for the following reasons:

(a) For the reason that the present action is one to determine whether or not certain contracts entered into between the parties hereto appearing in the Bill of Complaint are valid and enforceable, or null and void.

(b) For the reason that should the Supreme Court of Michigan determine that said contracts are enforceable and valid, plaintiff and appellant would suffer irreparable harm and great damage in the event said defendant and appellee proceeded with his suit in Cook County, Illinois, pending [fol. 5] the determination of this cause and the questions involved upon this appeal would become moot.

This motion is based upon the records and files in this cause and upon this affidavit of George F. Gronewold one of the attorneys for plaintiff and appellant attached hereto and made a part hereof.

Dated: November 3, 1947.

By George F. Gronewold, Attorney for Plaintiff & Appellant. Business Address: 1514 Security National Bank Bldg., Battle Creek, Michigan.

H. Victor Spike, Forbes B. Henderson, of Counsel.

[fol. 6] STATE OF MICHIGAN, IN THE SUPREME COURT

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

GRAND TRUNK WESTERN RAILROAD COMPANY, A Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

AFFIDAVIT

COUNTY OF CALHOUN, ss:

George F. Gronewold being duly sworn, deposes and says that he is one of the attorneys for the plaintiff and appellant in the above entitled cause; that plaintiff's Bill of Complaint and the records and files in said cause show the following:

Plaintiff was operating in the State of Michigan, in both Interstate and Intrastate commerce, that defendant was in its employ and was injured on November 23, 1946 at Battle Creek, Calhoun County, Michigan.

That on December 5 and December 21, 1946, plaintiff advanced defendant the sum of $50.00 on each occasion, and in consideration thereof defendant entered into a contract with plaintiff, providing among other things as follows:

> "If my claim cannot be settled to my satisfaction, and should I wish to start suit against the said Grand Trunk Western Railroad Company to recover damages for my said injuries, that any suit shall be commenced within the county or district where I resided at the time my injuries were sustained or in the county or district where by injuries were sustained, and not elsewhere."

[fol. 7] That on June 25, 1947, defendant commenced suit against the plaintiff in the Superior Court of Cook County, Illinois, for damages under the Federal Employers' Liability Act, 45 U. S. C. A. Section 51-60.

That on the 17th day of July, 1947, plaintiff filed its Bill of Complaint in the Circuit Court for Calhoun County, Michigan, praying for a temporary and permanent injunction

restraining defendant from maintaining, carrying on or prosecuting any action or proceedings in the State of Illinois or elsewhere except as provided in the above mentioned contract.

A temporary injunction was issued by the Calhoun County Circuit Court on said date and subsequently a motion was made by defendant to dismiss plaintiff's Bill of Complaint, to quash plaintiff's summons and dissolve the injunction.

That on the 27th day of October, 1947, the Calhoun County Circuit Court entered an Order of Dismissal, dismissing plaintiff's Bill of Complaint, quashing said summons and dissolving said temporary injunction.

That on the 29th day of October, 1947, plaintiff filed his Claim of Appeal with the Calhoun County Clerk in the nature of a general appeal to the Supreme Court of the State of Michigan.

Pending said appeal under the situation as it now exists, defendant can proceed with his suit against the plaintiff in the Superior Court for Cook County, Illinois.

That plaintiff will suffer irreparable harm and great damage unless defendant is restrained from proceeding with his said suit in the Superior Court for Cook County, Illinois during the pendency of this appeal.

Further deponent say as not.

George F. Gronewold.

Subscribed and sworn to before me this 3rd day of November, 1947. Kenneth P. Williams, Notary Public, Calhoun County, Michigan. My commission expires May 20, 1950.

[fol.[8]] THE SUPREME COURT, STATE OF MICHIGAN

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Calendar No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

Proof of Service

COUNTY OF CALHOUN, ss.

J. L. Mechem, being duly sworn, deposes and says that he resides in the City of Battle Creek, in said County, is a member of the firm of Mechem & Mechem, attorneys of record for the defendant and appellee in the above entitled cause.

That on the 13th day of November, 1947, he served the within Answer to Motion to continue Injunction on George F. Gronewold, E. Victor Spike and Forbes B. Henderson, attorneys for the above-named plaintiff and appellant, by depositing true copies of the same in the Postoffice in the City of Battle Creek, Michigan, enclosed in sealed envelopes, with postage thereon fully prepaid, and plainly addressed to said attorneys at their respective business addresses.

J. L. Mechem.

Subscribed and sworn to before me, a Notary Public in and for said County, this 13 day of November, A. D. 1947. Sadie S. Clemons. My commission expires Feb. 12, 1949.

[fol. 9] IN THE SUPREME COURT, STATE OF MICHIGAN

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Calendar No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

Answer to Motion to Continue Injunction

Comes Now Defendant and Appellee, Alexander Boyd, and in answer to the Motion of the above-named Appellant to continue the injunction issued in the lower court says:

(1) The invalidity under the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51-60) of certain contracts between the parties hereto, is one of the questions determined by the decision of the lower court herein.

(2) Appellee denies that any harm or damage will result to Appellant, if Appellee proceeds with his suit for damages now pending in Cook County, Illinois.

Appellee Prays that said Motion be denied.

Dated: November 10, 1947.

Mechem & Mechem, by J. L. Mechem, Attorneys for Defendant and Appellee, Business Address: 804 Michigan National Bank Building, Battle Creek, Michigan.

Melvin L. Griffith, Walter N. Murray, of Counsel. Business Address: 139 No. Clark Street, Chicago 2, Illinois.

[fol. 10] At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the second day of December, in the year of our Lord one thousand nine hundred and forty-seven.

Present the Honorable Leland W. Carr, Chief Justice; Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North, John R. Dethmers, Associate Justices.

43966

GRAND TRUNK WESTERN RAILROAD COMPANY, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant

In this cause a motion is filed by plaintiff for an order continuing the injunction heretofore issued herein in the Circuit Court for the County of Calhoun, in Chancery, and a brief in opposition thereto having been filed by defendant, and due consideration thereof having been had by the Court, It is ordered that the said defendant be and he is hereby restrained from in any manner assisting, aiding, participating, or engaging directly or indirectly in the prosecution of conduct of the cause of action now pending in the Superior Court of Cook County, Illinois, wherein Alexander Boyd is plaintiff and Grand Trunk Western Railroad is defendant, being Docket No. 47S10416, pending the determination of the appeal in this cause to this Court.

STATE OF MICHIGAN, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my ~~hand~~ and affixed the seal of said Supreme Court at Lansing, this 22nd day of October, in the year of our Lord one thousand nine hundred and forty-eight.

Jay Mertz, Clerk.

[fols. 10-13] IN CIRCUIT COURT OF CALHOUN COUNTY

CALENDAR ENTRIES

Date	Proceedings
1947	
July 17,	Filed bill of complaint.
July 17,	Issued summons.
July 17,	Issued injunction.
July 17,	Filed bond.
July 30,	Filed Defendant's appearance.
July 30,	Motion to dismiss Plaintiff's bill of complaint and to quash Plaintiff's summons and dissolve injunction.
Sept. 5,	Summons and injunction served.
Oct. 8,	Petition for leave to amend Defendant's motion to dismiss Plaintiff's bill of complaint and notice of hearing.
Oct. 10,	Proof of service of copy of Defendant's motion for leave to amend motion to dismiss.
Oct. 10,	Order granting leave to amend Defendant's motion to dismiss.
Oct. 20,	Finding and order granting Defendant's motion to dissolve the temporary injunction heretofore issued. Quash the summons and dismiss Plaintiff's bill of complaint.
Oct. 20,	Plaintiff's brief.
Oct. 20,	Brief.
Oct. 20,	Brief.
Oct. 27,	Order of dismissal.

[fol. 14] IN THE SUPREME COURT OF MICHIGAN

Appeal from the Circuit Court for Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Cal. No. 42352

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

STIPULATION RE SETTLEMENT OF CASE OF APPEAL

It is hereby stipulated and agreed that the attached case made on appeal shall be settled and signed by the Court as therein set forth, and that an order may be entered by the Court in accordance with this Stipulation.

Dated at Battle Creek, Michigan, this 15th day of January, 1948.

George F. Gronewold, Attorney for Plaintiff.
Mechem & Mechem, Attorneys for Defendant.

[fol. 15] IN CIRCUIT COURT OF CALHOUN COUNTY

IN CHANCERY

[Title omitted]

CLAIM OF APPEAL

Now comes the plaintiff herein, Grand Trunk Western Railroad Company, and claims an appeal from the order entered in said cause on the 27th day of October, 1947, by the Circuit Court for said County.

The appellants make appeal in the nature of a general appeal from said order.

Dated at Battle Creek, Calhoun County, Michigan, this 29th day of October, 1947.

George F. Gronewold, Attorney for Plaintiff. Business Address: 1514 Security National Bank Bldg., Battle Creek, Michigan.

H. Victor Spike, Forbes B. Henderson, of Counsel. 441 E. Jefferson Avenue, Detroit, Michigan.

[fol. 16] IN THE SUPREME COURT OF MICHIGAN

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

[Title omitted]

REASONS AND GROUNDS FOR APPEAL

The plaintiff and appellant, Grand Trunk Western Railroad Company appeal from the order granting defendant's motion, and the Order of Dismissal for the following reasons:

(1) The trial court erred in holding that the contracts entered into between plaintiff and defendant are void under the provisions of the Federal Employers' Liability Act, 45 U. S. C. A., Section 55 and 56.

(2) The court erred in holding that the contracts entered into between plaintiff and defendant did not furnish a sufficient basis for injunctive relief.

Dated the 15th day of January, 1948.

George F. Gronewold.

[fol. 17] IN CIRCUIT COURT OF CALHOUN COUNTY, IN CHANCERY

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff,

vs.

ALEXANDER BOYD, Defendant

BILL OF COMPLAINT—Filed July 17, 1947

Now comes Grand Trunk Western Railroad Company, a Michigan Corporation, hereinafter known as plaintiff, and respectfully shows unto the Court as follows:

1. Plaintiff now is, and continuously for more than ten years past has been, a corporation duly organized and existing under the laws of the State of Michigan, and has its principal office in the City of Detroit, Mich., and during said time has owned and operated and now

owns and operates, various lines of steam railroad extending into the State of Michigan as well as in other States of the United States, and has generally engaged in the business of conducting a steam railroad in both interstate and intra-state commerce.

2. Alexander Boyd, defendant herein, appears as plaintiff in a certain action now pending in the Superior Court of Cook County, Illinois, which is hereinafter referred to and more particularly indentified. Said defendant is a resident of East LeRoy, Calhoun County, [fol. 18] Michigan, and was a resident of East LeRoy at all the times hereinafter mentioned.

3. On or about November 23, 1946, at about 7:30 P. M. the said defendant suffered an injury while pulling an operating lever on a railroad car and the knuckle lock disconnected causing defendant to lose his balance and falling to the ground; which occurred in plaintiff's Nichols Yards in the City of Battle Creek, Calhoun County, Michigan.

4. Immediately after said injury defendant was given medical care and treatment at the expense of this plaintiff.

5. Subsequently defendant stated to plaintiff, on or about December 5, 1946, that he was without funds for living expenses, pending his ultimate recovery, and requested plaintiff to advance him funds: whereupon plaintiff did advance funds to defendant, in the amount of Fifty Dollars, in consideration of which defendant signed an agreement, on the date aforesaid, to-wit, December 5, 1946, providing that in consideration of said advancement, he agreed:

> "1. That I will endeavor in good faith to settle any claim I may have for my said injuries.
>
> "2. If my said claim cannot be settled to my satisfaction and should I wish to start suit against said Grand Trunk Western Railroad Company to recover damages for my said injuries, that any such suit shall be commenced within the county or district where I resided at the time my injuries were sustained or in the county or district where my injuries were sustained and not elsewhere."

A copy of said agreement is attached hereto, marked Exhibit "A", and made a part hereof.

[fol. 19] 6. On December 21, 1946 defendant represented to plaintiff that he was in further need of funds for living expenses, and requested plaintiff to advance him additional funds; whereupon plaintiff did advance to defendant the additional sum of Fifty Dollars, in consideration of which defendant signed a second agreement, dated December 21, 1946, containing provisions identical with those hereinabove quoted. A copy of said second agreement dated December 21, 1946, is attached hereto, marked Exhibit "B" and made a part hereof.

7. Not withstanding the agreements aforesaid, defendant commenced an action against the plaintiff about June 25, 1947, in the Superior Court of Cook County, Illinois, to recover damages for the injuries alleged to have been sustained as aforesaid, all contrary to the express terms of the aforesaid agreements. Said action is identified in said court as No. 47 S 10416. A copy of the summons issued in said cause is hereto attached, marked Exhibit "C".

8. Great and irreparable harm will be done to plaintiff if it is compelled to defend said suit in the courts of Chicago, Illinois. All the witnesses who are familiar with the facts pertaining to the alleged cause of action set forth in the complaint so filed in Cook County, Illinois, reside either in Calhoun County, Michigan or the State of Michigan. Plaintiff is informed and believes, and therefore avers that none of the witnesses familiar with the facts of said alleged cause of action reside in the State of Illinois or outside of the State of Michigan.

9. This plaintiff could have been, and can now, be compelled to answer an action or legal proceedings brought by the defendant in Calhoun County, Michigan, and in the event of a judgment against this plaintiff, in favor of defendant, in any of the courts of Michigan, [fol. 20] this plaintiff can be compelled by legal proceedings to pay such judgment.

10. There are many persons who would be competent witnesses for this plaintiff on the trial of said cause of action so set up by this petition filed by this defendant herein in Cook County, Illinois, all of whom know facts

material to the trial of said cause of action. The exact number of such persons this plaintiff cannot now state, but it is believed that the number would be ten or more. All of said witnesses, were, on November 23, 1946, and still are residents of the State of Michigan. If plaintiff is compelled to defend said action in Cook County, Illinois, it will not be able to compel the attendance of any of such persons or witnesses; and this plaintiff does not know whether such witnesses would go voluntarily into the State of Illinois to testify for this plaintiff. If such witnesses would express a willingness to go into the State of Illinois to testify, this plaintiff could not rely upon such expressed willingness and even if this plaintiff could take such witnesses to the City of Chicago in Cook County, Illinois, where such action is filed, to attend the trial thereof, it would impose upon plaintiff large and unwarranted expense.

11. This plaintiff would be under great disadvantage in trying said cause in the City of Chicago, Cook County, Illinois, if it should be unable to produce such witnesses in person at the trial. In view of the nature of the action brought by said defendant, in said City of Chicago, and the variety and extent of the testimony which may be offered in support of the claims set up in said action, it is of great importance to this plaintiff that its witnesses be present in person in order that the jury may hear their testimony and observe them while so testifying; and it is therefore of great importance to this plain-[fol. 21] tiff that it not be required to depend upon depositions in the trial of said cause.

12. This plaintiff would also suffer great disadvantage in the trial of said cause in said City of Chicago by reason of the difficulty of securing the presence there of witnesses whose testimony might be of value in rebuttal of testimony introduced by said defendant, in such trial, which witnesses might easily be obtained if such action were tried in Calhoun County, Michigan.

13. This plaintiff would also be subjected to the risk of having its witnesses, before or at the time of trial, fail or refuse to attend the trial, although having previously agreed to do so, thus depriving this plaintiff of the benefit of their testimony altogether by reason of its

inability to compel their attendance or to obtain their depositions on such short notice. Furtherfore, the witnesses of said defendant Boyd, the plaintiff in said action, would be more readily accessible to Calhoun County, Michigan.

14. This plaintiff will be put to very great inconvenience and expense and will suffer every considerable disadvantage if compelled to try said cause in said City of Chicago by reason of its being obliged to transport and maintain there such of its witnesses as may be willing to appear and testify in said court, if there be any such, and by reason also of being obliged to pay them such compensations as they may demand, and this plaintiff will be prejudiced before a jury by reason of having paid such transportation and compensation. Practically all the expenses and danger of not being able to obtain and secure the attendance of said witnesses will be obviated if this case is tried in Calhoun County, Michigan, in accordance with the terms of said agreements marked "Exhibit A", and "Exhibit B".

[fol. 22] 15. If plaintiff is compelled to defend said action in Cook County, Illinois, it will also suffer great inconvenience and expense by reason of the necessity of removing and transporting to Chicago, its operating records, all of which are, in the usual course of its business, lodged in, and currently used in, Battle Creek, and Detroit, Michigan.

16. Plaintiff is informed and believes, and therefore avers, that said action was brought against it in said City of Chicago, Cook County, Illinois, for no other reason or purpose than to cause great inconvenience, expense and damages to plaintiff, and in order that the defendant herein, might secure an inequitable, unjust and unconscionable advantage over this plaintiff, as herein set forth.

17. Plaintiff further avers that this petition is not filed in the purpose of delay, but for the purpose of compelling the defendant herein, to bring his action in accordance with the terms of said agreement in Calhoun County, Michigan, where he has resided for many years last past and where the accident occurred. By reason of all the facts herein alleged, the prosecution of the action above

referred to in the Superior Court of Cook County, Illinois, and the trial of said action in said court, does now, and will hereafter place an unreasonable burden upon this plaintiff, and does now, and will hereafter unreasonably, inequitably and unfairly harass and oppress this plaintiff.

18. Unless the defendant be restrained immediately upon filing of this action from prosecuting his action in said Superior Court of Cook County, Illinois, plaintiff, which is the defendant in said action, will be required to submit to the jurisdiction of said Superior Court of Cook County, Illinois, and this plaintiff will thereby suffer great and irreparable injury.

[fol. 23] 19. This plaintiff has no adequate remedy at law and its rights can only be protected in equity.

20. An emergency exists for the granting by this Court, without notice to the defendant, Boyd, of an immediate restraining order against him, restraining him from the further prosecution of said action in said Superior Court of Cook County, Illinois, or in any other court outside of Calhoun County, Michigan, which injunction, after hearing, should be made permanent; and unless the said defendant be so restrained, this plaintiff will be irreparably damaged.

Wherefore plaintiff prays:

a. That the said defendant may be required to make full, true, direct and perfect answer to all and singular matters hereinbefore stated and charged, but not under oath (his answer under oath being hereby expressly waived).

b. That a temporary injunction may be issued, without notice, restraining and enjoining the defendant from maintaining, carrying on, or prosecuting, in any way, any action or proceeding in the State of Illinois, or elsewhere than in Calhoun County, Michigan, as provided in said agreements, against this plaintiff, to recover damages growing out of the alleged injuries claimed to have been sustained by defendant in Calhoun County, Michigan, on November 23, 1946, and in particular, from in any manner asserting, aiding, participating, or engaging in, the prosecution of the aforesaid action brought by him and now pending in the Superior Court of Cook County, Illinois.

c. That upon the final hearing hereof said temporary injunction be made permanent.

[fol. 24] d. That plaintiff may have such other relief as may be just and equitable in the premises.

George F. Gronewold, Attorney for Plaintiff, Grand Trunk Western Railroad Co.

Duly sworn to by George F. Gronewold. Jurat omitted in printing.

[fol. 25] EXHIBIT "A" TO BILL OF COMPLAINT

Grand Trunk Western Railroad Company

Agreement for Advancement of Funds Prior to Determination of Liability

PIR 56087. Draft No. 3645

At my request the Grand Trunk Western Railroad Company has this day advanced to me the sum of Fifty Dollars ($50.00) for living and other expenses while I am disabled for work on account of injuries sustained by me at or near Battle Creek, Michigan, on or about the 23rd day of November, 1946, while employed as a switchman.

In consideration of said advancement I agree as follows:

1. That I will endeavor in good faith to settle any claim I may have for my said injuries.

2. If my said claim cannot be settled to my satisfaction and should I wish to start suit against said Grand Trunk Western Railroad Company to recover damages for my said injuries, that any such suit shall be commenced within the county or district where I resided at the time my injuries were sustained or in the county or district where my injuries were sustained and not elsewhere.

3. That all sums of money now or hereafter advanced to me by said Railroad Company shall be deducted from any [fol. 26] sum which shall finally be paid to me by said Railroad Company, either in settlement or as a satisfaction of judgment, or otherwise, on account of said injuries.

4. That the advancement of this or any other sum of money to me, and its acceptance by me, shall not be con-

sidered either as an admission of liability on the part of said Railroad Company, or as a waiver of any right that I may have to recover damages from said Railroad Company for said injuries.

Dated at Battle Creek, Michigan, this 5th day of December, 1946.

Alexander Boyd.

Witnesses: T. O. Leveille, Eunice N. Haaf.

EXHIBIT "B" TO BILL OF COMPLAINT

Grand Trunk Western Railroad Company Agreement for Advancement of Funds Prior to Determination of Liability

PIR 56007. Draft No. 3788

At my request Grand Trunk Western Railroad Company has this day advanced to me the sum of Fifty Dollars ($50.00) for living and other expenses while I am disabled for work on account of injuries sustained by me at or near Battle Creek, Michigan, on or about the 23rd day of November, 1946 while employed as a Yardkeeper.

In consideration of said advancement I agree as follows:

[fol. 27] 1. That I will endeavor in good faith to settle any claim I may have for my said injuries.

2. If my said claim cannot be settled to my satisfaction and should I wish to start suit against said Grand Trunk Western Railroad Company to recover damages for my said injuries, that any such suit shall be commenced within the county or district where I resided at the time my injuries were sustained or in the county or district where my injuries were sustained, and not elsewhere.

3. That all sums of money now or hereafter advanced to me by said Railroad Company shall be deducted from any sum which shall finally be paid to me by said Railroad Company, either in settlement or as satisfaction of judgment, or otherwise, on account of said injuries.

4. That the advancement of this or any other sum of money to me, and its acceptance by me, shall not be considered either as an admission of liability on the part of

said Railroad Company, or as a waiver of any right that I may have to recover damages from said Railroad Company for said injuries.

Dated at Battle Creek, Michigan this 21st day of December, 1946.

Alexander Boyd.

Witnesses: Frank J. Karas, T. O. Leveille.

[fol. 28] Exhibit "C" to Bill of Complaint

Jury Demanded

In the Name of the People of the State of Illinois in the Superior Court of Cook County, Illinois

Alexander Boyd, Plaintiff,

vs.

Grand Trunk Western Railroad Company, a Corp., Defendant

To the above named Defendant:

You are hereby summoned to answer the complaint in the above entitled cause.

Take notice that you must file your answer or otherwise make your appearance in said Court held in the Courthouse in the City of Chicago, Illinois, on Monday, July 21, A. D. 1947 provided this writ shall be served upon you not less than 20 days before said date, but if this writ shall be served upon you less than 20 days before said date, and if served 20 days before Monday, August 4, A. D. 1947 you shall file your answer or otherwise make your appearance on said last mentioned date.

If you do not appear according to the command of this writ, plaintiff may take judgment against you by default. [fol. 29] This summons must be returned, in person or by mail, by the officer or other person to whom it was given for service, with endorsement thereon of service and fees, if any, not later than 5 days after service and in no event later than the date first above named.

Witness, Henry Sonnenschein, the Clerk of said Court and the seal thereof, at Chicago, Illinois, this June 25, 1947 *day of June, 1947.*

Henry Sonnenschein, Clerk. (Seal.)

Plaintiff's Attorney (of Plaintiff, if he be not represented by Attorney): Edward B. Henalee, Address: 139 N. Clark St., Telephone State 5925.

[fol. 30] In Circuit Court of Calhoun County

In Chancery

[Title omitted]

Injunction—Filed July 17, 1947

In the Name of the People of the State of Michigan:

To: Alexander Boyd, and to his counsellors, attorneys and agents, and each and every one of them, Greeting:

Whereas, It has been represented to us, in the Circuit Court for the County of Calhoun, in Chancery, on the part of Grand Trunk Western Railroad Company, a Michigan Corporation, Plaintiff, that it has been lately exhibited its Bill of Complaint against you the said Alexander Boyd, Defendant, to be relieved, touching the matters therein complained of; in which Bill it is stated, among other things, that you are combining and confederating with others to injure the said Plaintiff touching the matters set forth in the said Bill, and that your actings and doings in the premises are contrary to equity and good conscience; we, therefore, in consideration thereof, and of the particular matters in the said Bill set forth, do strictly command you, the said Alexander Boyd and the persons before mentioned, [fol. 31] and each and every one of you, under the penalty of Ten Thousand Dollars ($10,000.00) to be levied on your lands, goods and chattels, to our use, that you do absolutely and refrain from in any manner assisting, aiding, participating or engaging, directly or indirectly, in the prosecution or conduct of the cause of action now pending in the Superior Court of Cook County, Illinois, wherein Alexander Boyd is plaintiff and said Grand Trunk Western Railroad

Company is defendant, being No. 47 S 10416 in said Court, or from instituting, maintaining, carrying on or prosecuting, in any way, any other action or suit against said Grand Trunk Western Railroad Company in any county or district other than the county or district where said Alexander Boyd resided at the time the claimed injuries were sustained, to-wit: Calhoun County, Michigan, or the county or district where said injuries were sustained, to-wit, Battle Creek, Calhoun County, Michigan, for damages by reason of injuries claimed to have been sustained by said Alexander Boyd in the Nichols Yards at Battle Creek, Calhoun County, Michigan on or about November 23, 1946, until the further order of this Court.

Witness, The Honorable Blaine W. Hatch, Circuit Judge, and the seal of said Circuit Court at Battle Creek, Michigan, this 17th day of July, 1947.

Edward J. Morse, Clerk. Herbert Mehler, Deputy Clerk.

George F. Gronewold, Attorney for Plaintiff. Business Address: 1514 Security National Bank Bldg., Battle Creek, Michigan.

[fol. 32] IN CIRCUIT COURT OF CALHOUN COUNTY
IN CHANCERY

[Title omitted]

MOTION TO DISMISS PLAINTIFF'S BILL OF COMPLAINT AND TO QUASH PLAINTIFF'S SUMMONS AND DISSOLVE INJUNCTION —Filed July 30, 1947

Comes Now Alexander Boyd, the above named defendant, by Mechem & Mechem, his attorneys, and moves this Honorable Court to dismiss the above-named plaintiff's Bill of Complaint in the aforesaid cause and to quash the summons and to dissolve the injunction therein issued, for the following reasons:

(1) That the said plaintiff's said Bill of Complaint does not state a cause of action, which would entitle said plaintiff to any relief.

(2) The aforesaid court does not have the power or jurisdiction to interfere with, or stay proceedings in an

action lawfully commenced under the Federal Employers Liability Act (45 U.S.C.A. Sections 51-60) prior to the beginning of the above-entitled cause, in a court of competent jurisdiction, to wit: the Superior Court of Cook County, State of Illinois.

[fol. 33] (3) Assuming for the sake of this motion, that all averments in said Bill of Complaint are true, nevertheless said Bill of Complaint does not state grounds upon which the above-entitled court could stay proceedings under the said Federal Employers Liability Act, lawfully theretofore commenced in a court of competent jurisdiction, to-wit: said Superior Court of Cook County, Illinois.

(4) It appears from said Bill of Complaint that said plaintiff has an adequate remedy of law.

This motion is based on the files and records of the above-entitled cause.

Dated July 30, 1947.

Mechem & Mechem, Attorneys for Defendant. Business Address: 804 Michigan Nat'l Bank Bldg., Battle Creek, Michigan.

Melvin L. Griffith, Walter N. Murray, of Counsel for defendant. Business Address: 139 N. Clark Street, Chicago, Illinois.

[fol. 34] In Circuit Court of Calhoun County
In Chancery

[Title omitted]

Petition for Leave To Amend Motion To Dismiss—Filed October 8, 1947

Comes Now Alexander Boyd, the above-named defendant, by Mechem & Mechem, his attorneys, and asks leave to amend his Motion to dismiss plaintiff's Bill of Complaint, which motion was heretofore filed on July 30, 1947, by adding the following paragraph to stand as Paragraph (5) of said Motion:

"(5) The effect of the agreements set up in the Bill of Complaint is to exempt the plaintiff from a liability

created by Section 6 of the Federal Employers' Liability Act (45 U. S. C. A. Sec. 56) and that they are void to that extent under Section 5 of said Act (45 U. S. C. A. Section 55)."

[fol. 35] This petition is based on the files and records in the above-entitled cause.

Dated: October 7, 1947.

Mechem & Mechem, Attorneys for Defendant. Business Address: 805 Michigan Nat'l Bank Bldg.; Battle Creek, Michigan.

Melvin L. Griffith, Walter N. Murray, of Counsel for Defendant. Business Address: 139 N. Clark Street, Chicago, Illinois.

[fol. 36] In Circuit Court of Calhoun County
In Chancery

[Title omitted]

Order Granting Leave to Amend Defendant's Motion to Dismiss—Filed October 10, 1947

At a session of said Court held in the Circuit Court, in the City of Battle Creek, in said County, this 10th day of October, 1947.

Present: The Honorable Blaine W. Hatch, Circuit Judge.

On reading and filing the petition of Alexander Boyd, the above-named defendant, for leave to amend his Motion to dismiss Plaintiff's Bill of Complaint, and after argument of the said matter, and the Court being fully advised in the premises: and

It appearing that said amendment asked is proper and should be permitted:

It Is Ordered that the said defendant's Motion to dismiss plaintiff's Bill of Complaint, which action was filed on July 30, 1947, be and is hereby amended by adding a paragraph to stand as Paragraph (5) of said Motion as follows:

"(5) The effect of the agreements set up in the Bill of Complaint is to exempt the plaintiff from a liability [fol. 37] created by Section 6 of the Federal Employers'

Liability Act (45 U. S. C. A. Sec. 55) and that they are void to that extent under Section 5 of said Act (45 U. S. C. A. Section 55)."

Blaine W. Hatch, Circuit Judge.

In Circuit Court of Calhoun County

In Chancery

[Title omitted]

Finding and Order Granting Defendant's Motion to Dissolve the Temporary Injunction Heretofore Issued, Quash the Summons and Dismiss Plaintiff's Bill of Complaint—Filed October 20, 1947

In this suit plaintiff seeks to enjoin the defendant from prosecuting an action in the Superior Court of Cook County, Illinois, or elsewhere than in the county or district in which the defendant Alexander Boyd, resides, to recover damages for injuries suffered by defendant in the course of his duties [fol. 38] as an employee of plaintiff in its Nichols Yards in the City of Battle Creek, Michigan on November 23, 1946.

The allegations of the bill of complaint, briefly stated are as follows: That plaintiff is a corporation duly organized and existing under the laws of the State of Michigan, with its principal offices in the City of Detroit, Michigan: that it owns and operates various lines of steam railroad extending into the State of Michigan as well as other States of the United States, and is engaged in conducting a steam railroad in both interstate and intrastate commerce.

That defendant Alexander Boyd is a resident of East LeRoy, Calhoun County, Michigan, and was such a resident on November 23, 1946 at the time the accident and his injuries occurred.

That defendant at about seven-thirty p. m. on November 23, 1946, suffered an injury in plaintiff's Nichols Yards in the City of Battle Creek, Calhoun County, Michigan, to-wit: while pulling an operating lever on a railroad car, the knuckle lock disconnected, causing defendant to lose his balance and fall to the ground.

The bill further alleges that subsequent to the accident and defendant's injuries, the defendant was without funds,

for living expenses and requested plaintiff to advance him funds; that defendant on each of two occasions on December 5, 1946 and December 21, 1946 advanced him Fifty Dollars, and on each occasion defendant signed an agreement providing that in the event his claim could not be settled satisfactorily to him and suit became necessary:

> "Such suit shall be commenced within the county or district where I resided at the time my injuries were sustained, or in the county or district where my injuries were sustained and not elsewhere."

[fol. 39] Said agreements contained the further provisions:

> "That all sums of money now or hereafter advanced me by said Railroad Company shall be deducted from any sum which shall finally be paid to me by said Railroad Company, either in settlement or as a satisfaction of judgment, or otherwise, on account of said injuries."

It is further alleged in paragraph seven of said bill of complaint that on June 25, 1947 the defendant, in violation of his said agreement filed suit in the Superior Court of Cook County, Illinois, to recover damages for the injuries received by him in said accident, and that said Illinois suit is identified as Number 47 S 10416 in the Superior Court of Cook County.

Plaintiff's bill of complaint further alleges that great expense, inconvenience and irreparable harm will be done plaintiff if it is compelled to defend suit in the courts of Chicago, Illinois. That all the witnesses in the suit reside in Michigan and not in Illinois.

Defendant filed his motion on July 30, 1947 to dissolve the temporary injunction heretofore issued in this suit on July 17, 1947 and to quash the summons and dismiss said suit.

The main question to be decided in the validity of the contracts entered into by plaintiff and defendant and their sufficiency as a basis for injunctive relief in view of the provisions of 45 U. S. C. A. Sections 55 and 56.

The Illinois suit was brought under the Federal Employers' Liability Act, 45 U. S. C. A., Section 51-60, and the Federal Safety Appliance Acts, 45 U. S. C. A., Sections 1-16, and alleges that the defendant Grand Trunk Western

Railroad Company operates a system of railroad lines [fol. 40] running through the States of Michigan and Illinois, and that one of its lines runs into Chicago, Cook County, Illinois, where it maintains an office in charge of officers and agents upon whom service of process may be had.

45 U. S. C. A., Section 56, provides as follows:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States, under this chapter, shall be concurrent with that of the courts of the several states, and no case arising under this chapter and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

It is apparent from said section that defendant Alexander Boyd had a right to file his suit in the Superior Court of Cook County, Illinois, unless he is prohibited from so doing by the agreements he entered into with the plaintiff.

The question of the validity of said agreements depends upon the provision of 45 U. S. C. A. Section 55 which section provides as follows:

> "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: * * *."

It is the contention of the plaintiff herein that said agreements signed by defendant do not come within the terms of [fol. 41] said Section 56, as the intent and purpose of said agreements is not to release the employer from any liability under the terms of this chapter relative to Federal Employer Liability Act: that liability as therein used refers merely to the employers' liability to respond to damages and does not refer to the question of jurisdiction or venue which is a matter of privilege, which defendant had a right to waive.

It is the contention of defendant that the agreements signed by defendant do not come within the terms of said Section 55 and the intent and purpose of the agreements

was to enable the employer to exempt himself from liability created by this chapter relative to Federal Employers Liability Act, to-wit: venue or jurisdiction. They contend that Section 56 of said chapter does create a liability as to the employer: that it must submit to suit in any district in which it is doing business: that said provisions as to jurisdiction or venue are a statutory right created in behalf of the employee and cannot be limited to contract in face of a specific statute which prohibits such a contract.

This suit therefore involves a construction of 45 U. S. C. A. Sec. 55-56.

The respective parties to this controversy have filed lengthy and very comprehensive briefs and after reading same and listening to arguments of counsel, it appears that the Supreme Court has not passed upon the precise question here involved. However, various United States District Courts and State Courts have passed upon same and are divided as to whether or not such an agreement as the ones in the case at bar, limiting the venue as granted in Section 56 of said section are prohibited by Section 55 of said chapter and are therefore void.

[fol. 42] After a thorough consideration of said decisions, I am inclined to agree with those jurisdictions which hold that said contracts or agreements seeking to limit jurisdiction or venue as provided for under Section 56 of said chapter are void under the provisions of Section 55.

As was said by the Supreme Court of Utah in the case of Peterson vs. Ogden Railway and Depot Company, 176 PAC (2nd) 744 (1946) in denying validity to a similar contract there involved.

> "It is apparent that Congress by the use of the very broad terms of Section 5 intended to protect fully the rights given employees by the Chapter. The Section says 'any' device whatsoever the purpose or intent of which shall be to enable the carrier to exempt itself from 'any' liability created by the chapter shall to that extent be void. The Supreme Court of the United States in Duncan v. Thompson, January, 1942, 315 U. S. C. A. 1, 62 S. Ct. 422, 86 L. Ed. 565, held the section applied to contracts made after the cause of action arose as well as those made before. Regardless of the intention of the parties, the contract or device is void. Philadelphia, B & W R. Co. vs. Schubert, 224 U. S.

603, 32 S. Ct. 589, 56 L. Ed. 911; McAdow vs. Kansas City Western R. Co., 100 Kan. 309, 164, P. 177 L. R. A. 1917 E. 539; Larson v. Lewis-Simas-Jones Co., 29 Cal. App. 2nd. 83, P. 2d. 296. • • •

"Section 6 makes available to the plaintiff several courts in which he may bring the action. Clearly that section gives the employee substantial benefits. It was not only for his convenience and to enable him to choose a court where the expense of litigation would not be [fol. 43] prohibitive but it was to give him the right to select the court in which he considers it would be more advantageous for him to bring his action. • • •

"The defendant contends that the plaintiff exercised his right to choose the court in which to bring his action by entering into the contract and, inasmuch as the plaintiff had the right to choose and exercised that right by choosing the federal court, Section 5 and 6 of the Act are not contravened by the contract.

"The spirit and the letter of the Act require that an injured employee be left free and uninfluenced by the carrier in selecting the court in which to bring his action. The liableness to a judicial pronouncement of liability in any of the courts enumerated in Section 6 of the Federal Employers' Liability Act is itself a 'liability' as that word is used in Section 5 of the Act. Hence so much of the contract as attempts to limit the courts in which plaintiff may bring his suit is void under Section 5 and should not be enforced."

In the case of Sherman vs. Pere Marquette Ry. Co., 62 Fed. Supp. 590 (1945) the Court, in holding a similar agreement or contract relative to venue void, said:

"The comprehensive phraseology of Section 5 certainly includes within its meaning a contract the purpose or intent of which is to enable the common carrier to exempt itself from liability to suit for a violation of the Act 'in the district • • • in which the defendant shall be doing business at the time of commencing such action.' The beneficial effects of the statute should not be whittled away by the courts by dis- [fol. 44] tinguishing between adjective and substantive rights and adjective and substantive duties or liabilities. Adjective rights and their co-relative duties or

liabilities are frequently as important as substantive rights, and substantive rights and their co-relative duties or liabilities are of little value without adjective rights and their correlative duties or liabilities whereby the substantive rights are enforced. (It has been said that the word 'liability' in Section 5 is limited to the liability of the carrier to respond in damages, but when we say that we beg the real question, which is as to the meaning of the word 'liability' in Section 5. It is said that venue is a privilege that may be waived, and that the case of Neirbo Co. v. Bethlehem Corp., 308 U. S. 165 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437 lends support to the view). Generally speaking, venue is a privilege which may be waived, but it may not be contracted away in the face of a specific statute which prohibits such contracting, as does Section 5 of the Employers Liability Act under consideration."

In the case of Fleming vs. Husted, 68 F. S. 900 (1946) the Court in finding a similar contract void, said:

"It seems plain to me that Congress did not intend to limit the right to voiding a contract limiting liability under the act to the liability under paragraph one of the Act, but that it is on all obligations created by the Act or against the employer, and I cannot conscientiously determine and find these contracts were valid contracts. Venue is easy to be waived, we all know that is true, but it has nothing to do with this case. Here we have a statutory right created and broadened by the Act itself, and that statutory right creates an addi- [fol. 45] tional obligation to the part of the employer, and also brings with it the prohibition against entering into a contract to limit that right as being void under Section Five of Act 45 USCA Paragraph 55."

There can be no doubt that Congress in passing Section 55 intended it to be very comprehensive, as was held by Justice Black in the case of Duncan vs. Thompson, 315 U. S. 1, 62 S. Ct. 422, 424 (1942). The wording, any contract, any common carrier and any liability clearly points out that Congress had in mind to stop any device by any carriers to evade any obligation created by the act. It did not refer alone to their liability to respond in damages, but any liability created by the Act. Therefore, any contract

or device that sought to exempt any common carrier from any liability, as created by Section 56, is void to that extent.

Congress, in passing Section 56, broadened the jurisdiction of actions under the Federal Employers Liability Act, whereas an employer could previously only be sued in the district court of its residence, said section now provides that it may be sued in the district court of the residence of defendant, or in which the cause of action arose or in which defendant shall be doing business at the time of the commencement of such action.

Clearly, this section gave the employee substantial benefits and created a liability against the employer. He had now no choice or privilege as to where he could be sued, he was subject to suit in any of said districts mentioned. While it is true that the employee had the privilege to sue in any of said districts, he had a right to exercise said privilege in selecting said jurisdiction free and unhampered by an interference from the employer. That said provision [fol. 46] relative to venue created a liability on the part of the employer, is recognized by the employer himself when he seeks by agreement with the employee to limit the place of venue. The employer recognized the fact that said section does create a liability in that it gives the employee a right to choose between two or more jurisdictions, and to start his suit in the jurisdiction that is the most advantageous to himself.

The plaintiff recognized this fact and sought by said agreement to limit the jurisdiction to the county or district in which the injury occurred, and in which the employee lived.

The allegations of plaintiff's bill also recognized that the provisions of Section 56 create a liability on its part as it alleges that the bringing of the suit in the Superior Court of Cook County, Illinois, will result in great and irreparable harm to plaintiff in the way of expenses and inconvenience in preparation and trial of said suit, as all of the witnesses reside in the State of Michigan.

The very purpose of the contracts or agreements in this case is to exempt the plaintiff from liability to a suit outside of the county or district in which the defendant resided or in which the defendant resided or in which the injuries occurred, to-wit: the Circuit Court of Calhoun County, or the District Court at Detroit. It was an attempt by said agreements to limit the place of venue of said action created by

said statute and to relieve themselves of the liability created thereby, and said agreements are therefore void and do not form a basis for the injunctive relief prayed for.

The allegations in the bill of complaint, as to additional expense and inconvenience the plaintiff would be put to, in the trial of the case in the Superior Court of Cook County do not constitute grounds for injunctive relief.

[fol. 47] See Baltimore and O. R. Co. vs. Kepner, 314 U. S. 44, 62 S. Ct. 6;

Miles vs. Illinois Cent. R. Co., 315 U. S. Ct. 638, 62 U. S. Ct. 827.

The plaintiff cannot complain of the additional expense or inconvenience caused by the suit in Cook County, Illinois, as the defendant had a right to bring his suit in any jurisdiction granted him by the provisions of the Federal Employers Liability Act, and plaintiff is compelled to submit to any inconvenience resulting therefrom.

I therefore find that the plaintiff's bill of complaint does not set forth grounds for equitable relief; and the motion of defendant to dissolve the temporary injunction heretofore issued, and quash said summons and dismiss said suit, should be and the same is hereby granted, and the injunction dissolved, summons quashed and suit dismissed.

Dated: October 20, 1947.

Blaine W. Hatch, Circuit Judge.

[fol. 48] In Circuit Court of Calhoun County
In Chancery

Grand Trunk Western Railroad Company, a Michigan Corporation,

vs.

Alexander Boyd, Defendant

Order of Dismissal—Filed October 27, 1947

At a session of said Circuit Court, held at the Circuit Court Rooms in the City of Battle Creek, Michigan on the 27th day of October, A. D. 1947.

Present: The Honorable Blaine W. Hatch, Circuit Judge.

This cause came on to be heard upon the Motion of the above-named defendant to dismiss the plaintiff's bill of

complaint and to quash plaintiff's summons, and to dissolve the temporary injunction for plaintiff and for the defendant: and thereupon, upon due consideration thereof.

It is hereby ordered, adjudged and decreed that the said Motion be and the same is hereby allowed and adjudged to be well taken, and the said plaintiff's bill of complaint is hereby dismissed, the plaintiff's summons heretofore issued in said cause is hereby quashed, and the plaintiff's temporary injunction heretofore issued in said cause is hereby dissolved.

[fols. 49-50] It is further ordered, adjudged and decreed that the said defendant recover his costs of said Motion against the said plaintiff to be taxed, and have execution therefor.

Blaine W. Hatch, Circuit Judge.

In Circuit Court of Calhoun County

Certificate of Court

I hereby certify that the foregoing record contains all the pleadings in said cause, and all matters and things which in any manner affect the exceptions therein noted.

I further certify that by stipulation of Counsel the time for settlement has been set as of this date.

I further certify that the Statement of Reasons and Grounds for Appeal, which are hereto annexed accompanied the case made at the time the same was signed and settled by me.

Signed this 19th day of January, 1948.

Blaine W. Hatch, Circuit Judge.

[fol. 12] IN THE SUPREME COURT, STATE OF MICHIGAN

43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

This cause will be brought on for hearing and argument at the next April term of said Court.

Yours, etc.,

George F. Gronewold, Attorney for Plaintiff and Appellant.

To Mechem & Mechem, Melvin L. Griffith and Walter N. Murray, Attorneys for Defendant and Appellee, dated March 8, 1948.

To Jay Mertz, Clerk of said Court:

Sir: You will please place said cause on the docket of this Court for said term.

George F. Gronewold, Attorney for Plaintiff and Appellant.

[fol. 13] At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the ninth day of April, in the year of our Lord one thousand nine hundred and forty-eight.

Present the Honorable George E. Bushnell, Chief Justice, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North, John R. Dethmers, Henry M. Butzel, Leland W. Carr, Associate Justices.

43966

GRAND TRUNK WESTERN RAILROAD COMPANY,

vs.

ALEXANDER BOYD

This cause coming on to be heard is argued by Mr. Gronewold for the plaintiff and by Mr. Mechem for the defendant and is duly submitted.

[fol. 14] SUPREME COURT, STATE OF MICHIGAN

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

Before the Entire Bench—REID, J.

Plaintiff filed the bill of complaint for an injunction forbidding defendant from taking further proceedings with an action brought by defendant against plaintiff elsewhere than in the county or district where defendant resided or was injured, contrary to two agreements. From a decree dismissing the bill on motion, plaintiff appeals.

Defendant Boyd was injured on November 23, 1946, at Battle Creek, Michigan, while in the employment of plaintiff railroad company, which company was then and there operating as a common carrier in both interstate and intrastate commerce. On December 5, 1946, on request of defendant Boyd, plaintiff railroad company advanced to him $50, without admitting liability, and in consideration of the advancement defendant Boyd signed an agreement containing the following:

"If my said claim cannot be settled to my satisfaction and should I wish to start suit against said Grand Trunk Western Railroad Company to recover damages for my said injuries, that any such suit shall be commenced within the county or district where I resided at the time my injuries were sustained or in the county or district where my injuries were sustained and not elsewhere."

On December 21, 1946, defendant Boyd, being in further need of money, requested another advancement and plaintiff railroad company thereupon furnished him an additional $50 as an advancement, in consideration of which defendant signed a further agreement containing language identical with that above quoted.

[fol. 15] Plaintiff does not dispute that defendant was injured and that when he was injured both defendant and the plaintiff railroad company were engaged in interstate commerce and that defendant's cause of action arose under the Federal employers' liability act, that defendant's injuries were such to prevent him from going back to work, that

he was without funds for living expenses, that the amount of the two payments totaling $100 it was agreed should be deducted from the final amount the plaintiff railroad company would be required to pay him in settlement or satisfaction of his judgment or otherwise.

On June 25, 1947, defendant began a suit against plaintiff railroad company in the superior court of Cook county, Illinois, to recover damages for his said injury. Plaintiff railroad company seeks to enjoin defendant from proceeding any further in said suit and alleges that it will suffer irreparable harm in — compelled to bring its witnesses to Cook county superior court; that about 10 or more competent, all living in Michigan, would be required to attend the trial outside of the State of their residence; that the expense of procuring the attendance of the witnesses in Cook county superior court would be very much greater than if the trial could be had in Michigan; that the witnesses could not be compelled to cross the State line; that many of them might refuse to attend in the State of Illinois; and that plaintiff railroad company would be put to a great disadvantage in attending at the venue chosen by defendant.

Defendant claims the two agreements to be void as contravening the provisions of the Federal employers' liability act, as amended in 1939, 45 USCA, Sections 55, 56 of which are in part as follows:

"Sec. 55. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any *liability* created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled to thereto on account of the injury or death for which said action was brought.

"Sec. 56. * * * Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be [fol. 16] doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the

courts of the several states, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." (Italics supplied)

Plaintiff railroad company claims that the liability mentioned in section 55 is the liability to respond in damages, and has no reference to venue. Plaintiff further claims that by the two contracts the liability remains unchanged and that only the venue is affected. Plaintiff further claims that the word "liability" italicized in the above quotation of section 55 means the liability created in section 51 of the same chapter, the Federal employers' liability act, as amended in 1939, 45 USCA, Section 51, which reads in part a follows:

"Every common carrier (engaged in interstate commerce) * * * *shall be liable in damages* to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Italics supplied.)

Plaintiff further claims that the provisions of section 55 are aimed at a present evasion of a future occurring liability and not at a compromise or settlement of an already accrued cause of action.

We must consider the meaning of the word "liability" as used in section 55 in question, and on the determination of the construction to be given that word will depend the result of this case.

Webster's New International Dictionary (2d Ed.), Unabridged, gives the following definition of "liability":

"1. State or quality of being liable; as, *liability* of an insurer.

"2. That which one is under obligation to pay, or for which one is liable. * * *

"3. • • • A debt; an amount which is owed."

"'Liabilities' are the antithesis of 'assets'." *Lovejoy v. Inhabitants of Foxcroft*, 91 Me. 367 (40 Atl. 141, 147), cited in 25 Words and Phrases (Perm. Ed.), p. 59.

Our attention has not been directed to any case which uses the word "liability" as meaning venue, excepting the four [fol. 47] cases cited by defendant: *Peterson v. Ogden Union Railway & Depot Co.* — Utah — (175 Pac. (2d) 744); *Sherman v. P. M. Ry. Co.*, 62 Fed. Supp. 590; *Fleming v. Husted*, 68 Fed. Supp. 900; and *Krenger v. Pennsylvania R. Co.*, 8 F. R. D. 65.

To an effect contrary to the above four cases, the following construe the word liability in such a manner as to result in upholding the two contracts in question: *Detwiler v. Lowden*, 198 Minn. 185 (269 N. W. 367); *Detwiler v. Chicago R. I. & P. Ry. Co.*, 15 Fed. Supp. 541; *Clark v. Lowden*, 48 Fed. Supp. 261; *Herrington v. Thompson*, 61 Fed. Supp. 903; *Roland v. Atchison, T. & S. F. Ry. Co.*, 65 Fed. Supp. 630; *Akerly v. N. Y. Cent. R. Co.*, 73 Fed. Supp. 903 (16 L. W. 2175).

There are reasons why Congress should interest itself in prohibiting contracts that would evade liability for damages or contracts requiring employees to waive such liability as a condition of employment; but there is no apparent reason why Congress should interest itself in prohibiting a fair and reasonable contract made without fraud after a cause of action has accrued. The two contracts in question would serve the convenience of both parties and give the defendant a choice between the circuit court of Calhoun County and the Federal court of the western district of Michigan, either of which forums would afford to the defendant a full and complete remedy. The act of defendant in bringing the suit in the Chicago court as described in the declaration savors strongly of nuisance value.

If Congress by using the word liability in section 55 had intended to include venue, such intent could have been readily and clearly expressed. It is to be noted that Congress did not say "exempt itself from any of the provisions of this chapter," but Congres says only "from any liability created by this chapter."

Section 51 of the chapter (hereinbefore quoted) declares the matters for which the employer is "liable" and that liability is for injuries sustained by an employee. That

liability in its various forms is plainly the liability contemplated in section 55 in question.

In respect to civil (as distinguished from criminal) cases, the common meaning of "liability" is that it is an obligation to pay a debt or amount owed and does not include venue. [fol. 18] While there is a conflict in the authorities, in construing the section in question, section 55, we give to the word liability simply its plain and almost universally accepted meaning. We find that the weight of authorities sustains contracts of the nature of the contracts in question.

Venue may be waived.

"Venue relates to the convenience of litigants, and therefore may be waived by them. * * * The right to have a case heard in the court of proper venue may be lost unless seasonably asserted. * * * The right to have a case heard in the court of proper venue may be waived by any party, including the government." *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (syllabi L. Ed.), 324 U. S. 635, 636 (65 Sup. Ct. 821, 89 L. Ed. 1241, 1242).

For the foregoing reasons, we consider that the two contracts in question are legal and binding on the defendant.

The decree appealed from is reversed and a decree will be entered in this Court restoring *and* temporary injunction as granted by the lower court, and remanding the cause to the lower court for further proceedings. No costs, a question of public importance being involved.

Bushnell, C. J., and Sharpe, North, Dethmers, and Carr, JJ., concurred with Reid, J.

Boyles, J. (concurring):

Section 6 of the Federal employers' liability act on which Boyd relies for venue in Illinois was enacted in 1910. It was in effect in 1934 at the time of this Court's decision in *Pere Marquette R. Co. v. Slutz*, 268 Mich. 388. Nor has it been changed since. The *Slutz Case*, *Supra*, is bottomed on a statute of this State referring to procedure in the courts of this State on causes of action arising in this State. It is controlling here and the circumstance that there is a contract which is in accord with the statue merely adds support to that conclusion.

In *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44 (62 Sup. Ct. 6, 86 L. Ed. 28, 136 A. L. R. 1222), there was neither

a State statute nor a contract, and the case is not controlling here. For the above reasons I concur in the opinion of Mr. Justice Reid.

Bushnell, C. J., and Butzel, J., concurred with Boyles, J.

[fol. 19] At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twenty-ninth day of June, in the year of our Lord one thousand nine hundred and forty-eight.

Present the Honorable George E. Bushnell, Chief Justice, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North, John R. Dethmers, Henry M. Butzel, Leland W. Carr, Associate Justices.

43966

GRAND TRUNK WESTERN RAILROAD COMPANY, Plaintiff and Appellant;

vs.

ALEXANDER BOYD, Defendant

This cause having been brought to this Court by appeal from the Circuit Court for the County of Calhoun, in Chancery, and having been argued by counsel, and due deliberation had thereon, it is now ordered, adjudged and decreed by the Court, that the decree of the Circuit Court for the county of Calhoun, in Chancery be and the same is hereby reversed, vacated and held for naught, and it is further ordered that the temporary injunction, as granted by the lower Court, be and the same is in all things restored, and the cause remanded to the lower Court for further proceedings. It is further ordered that no costs be awarded herein.

STATE OF MICHIGAN, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that

it is a true transcript therefrom, and the whole of said original decree.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 22nd day of October, in the year of our Lord one thousand nine hundred and forty-eight.

Jay Mertz, Clerk.

[fols. 59-61] IN THE SUPREME COURT OF MICHIGAN

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge.

[Title omitted]

APPLICATION FOR REHEARING

To the Honorable Judges of the Supreme Court of Michigan:

Now comes Alexander Boyd, Defendant-Appellee in the above cause, by Mechem & Mechem, his attorneys, and presents herewith his application for a rehearing of said cause and respectfully prays that a Rehearing be granted in said cause upon the grounds and for the reasons hereinafter set forth.

Mechem & Mechem, Attorneys for Defendant Appellee.

[fol. 62] MAY IT PLEASE THE COURT:

I

A rehearing should be granted because the question involved in the case at bar, is controlled by a contrary decision, involving the same question, just rendered by the United States Circuit Court of Appeals, 6th Circuit.

This cause was argued before this Honorable Court on April 9, 1948. The opinion of this Court was filed June 29, 1948.

Subsequent to the argument, to-wit: on June 14, 1948, the United States Circuit Court of Appeals, Sixth Circuit, rendered decision in the case of *Akerly* v. *New York Central Railroad* reversing, on appeal, the United States District Court for the Northern District of Ohio, Eastern Division. The decision of the District Court is reported in 73 Fed. Supp. 903. The decision in the United States Circuit Court of Appeals is not yet reported, to the best of our information and belief; but a copy of it has been obtained and is attached to this application as Exhibit 1, and incorporated herein by reference.

The United States District Court in the *Akerly* case Held (as did this Court) that a contract limiting venue, made after the cause of action arose, was valid and not in con-

travention of Section 5 of the Federal Employers' Liability Act. (45 U.S.C.A. Sec. 55).

The United States Circuit Court of Appeals in the *Akerly* case reversing this decision Held (relying on *Duncan* v. *Thompson*, 315 U. S. 1, 86 L. Ed. 575) that such contract was in contravention of Section 5 of said Act and there-[fol. 63] fore void. It further Held that Section 6 of said Act, which enlarged the employee's choice of venue, created a "liability" on the carrier employer; that such "liability" was within the provisions of Section 5 of said Act, which makes void any "contract or device" by which the carrier seeks to exempt itself in whole or in part from such "liability".

Prior to June 14, 1948, there was no ruling on this point by any Federal Court in Michigan. By the United States Circuit Court of Appeals in the *Akerly* case, the federal rule is now settled in all territory embraced within the jurisdiction of such Circuit Court of Appeals, which includes Michigan.

Brazel v. *Thompson*, 141 Mich. 628, 634.

Whenever Congress enacts a statute under the Commerce Clause, such law, when enforced in both state and federal courts, must be construed in the light of federal decisions, and the decisions of the State courts must conform to the interpretation of the Federal court prevailing in the jurisdiction which includes such state.

Brazel v. *Thompson*, supra;
Howe v. *Railroad Co.*, 236 Mich. 577, 587;
Bement v. *G. R. & I. Ry.*, 194 Mich. 64;
Lynn v. *Clark*, 124 Mich. 190;
Jorgensen v. *G. R. & I. Ry.*, 189 Mich. 537;
Gaines v. *Grand Trunk R. R.*, 193 Mich. 398;
Nelson v. *Ironwood, etc. Ry.*, 201 Mich. 347;
People v. *Lechner*, 307 Mich. 358;
See Annotated Note, 147 A.L.R. 857.

Where the law of the case has been overruled by a subsequent decision, or by a prior decision not available to [fol. 64] or known by the court until after decision rendered, in a case involving the same question, rehearing will be granted and the former decree reversed.

Lynn v. *Clark*, *Supra*;
Staub v. *Tripp*, 253 Mich. 633;
Kavanaugh v. *Baird*, 253 Mich. 631.

II

The Court in holding that Section 5 (45 U.S.C.A. Section 45) relates solely to liability to pay damages under Section 1 (45 U.S.C.A. Section 51) overlooked or misapprehended the expressly declared purpose of Congress in passing and amending the Federal Employers' Liability Act.

1. Congress declared its own purpose in passing and perfecting the Federal Employers' Liability Act. The primary purpose was not to create liability. Liability had always existed in the common law right of action already in the possession of the injured railroad man. Congress merely took that Common Law right of action and pruned away its injustices. (Defendant-Appellee's Brief pp. 8, 12).

The Fellow-Servant Rule was abolished in Section 1 (45 U.S.C.A. Sec. 51):

> "Every common carrier by railroad while engaging in commerce between the several states • • • shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce • • • for such injury • • • resulting in whole or in part from the negligence of any of the officers, agents *or employees* of such carrier." (Italics ours).

[fol. 65] Contributory Negligence as a bar to the action was abolished in Section 3 (45 U.S.C.A. Sec. 53) and Comparative Negligence was substituted in its place.

The Assumption of Risk Doctrine was abolished in Section 4 (45 U.S.C.A. Sec. 54).

The practice of the carriers of exempting themselves from liability was outlawed in Section 5 (45 U.S.C.A. Sec. 55), in language so comprehensive as to protect every major purpose of the Act.

The injustice of requiring an injured man to sue his employer in the district of which it was an inhabitant was removed by the 1910 amendment, which was added to the Act as Section 6 (45 U.S.C.A. Sec. 56), and the injured man given three choices of a place to sue.

Section 9 (45 U.S.C.A. Sec. 59) provided for the survival of the injured person's right of action to his next of kin, which is likewise freed under the Act from those common law defenses and practices above described.

Any contract, rule, regulation or device whatsoever, the intent or purpose of which is to prevent injured employees from securing information as to the facts incident to injury are outlawed by Section 10 (45 U.S.C.A. Sec. 60).

The primary purpose of Congress, according to its own declaration, was, to the full extent of its powers, to do away with these injustices that had become attached to the common law right of action for wrongful injury like barnacles to an old ship. If, in the process, Congress created a new liability, that liability is the result of all of these major provisions and not of Section 1 or of any number of them less than all of them. Each one of these major provisions is an integral part of the whole liability. [fol. 66] As Judge Allen says in the opinion in the *Akerly* Case, hereto attached as Exhibit 1, referring to Section 5:

> "We think that the inclusion of this section in the Employers' Liability Act, with its creation of new obligations against the employer, makes the Venue Section (Sec. 6) an inherent part of the employer's liability."

2. The Court, also, overlooked the fact that the authorities on which it relies for its decision are all based upon the former rule that while contracts made before the cause of action arises are invalid as against public policy, contracts made after the cause of action has accrued are valid, and that all of those authorities were overruled on this point by the Supreme Court of the United States in *Duncan* v. *Thompson*, 315 U. S. 1, 63 Sct. 422, 86 L. Ed. 575, cited in Appellee's Brief (pp. 16, 23, 25).

3. Reference is made by Mr. Justice Boyles in a concurring opinion that the case at bar is "controlled" by *Pere Marquette Ry.* v. *Slutz*, 268 Mich. 388, decided in 1934. It is respectfully pointed out that the *Slutz* Case did not arise under the Federal Employers' Liability Act; but was merely an action for personal injuries by a man who was run into by a railroad train. Neither do the provisions of the Michigan Judicature Act referred to in the *Slutz* case affect the case at bar. The federal statute in respect to venue of causes arising under the statute is controlling. The decisions of state courts, under the Federal Employers' Liability Act, must be in accord with the

federal statute and the federal rule as to its application, rather than state statute, rule or policy.

[fol. 67] *Baltimore & Ohio Ry.* v. *Kepner*, 314 U. S. 44, 86 L. Ed. 28;

Miles v. *Illinois Central R. R.*, 315 U. S. 698, 86 L. Ed. 1129.

Conclusion

We respectfully submit that the controlling authority of the United States Circuit Court of Appeals in the *Akerly* Case, and the misapprehension of this Court of the scope and meaning of the Federal Employers' Liability Act and of the decisions of the United States Supreme Court construing same, require this Court to grant a rehearing for reconsideration of its decision and final affirmance of the judgment of the trial court.

Respectfully submitted, Mechem & Mechem, Attorneys for Defendant and Appellee.

Melvin L. Griffith, Walter N. Murray, of Counsel.

[fol. 68] Exhibit I to Application for Rehearing

In United States Circuit Court of Appeals, Sixth Circuit

No. 10585

Blaine F. Akerly, Appellant,

vs.

New York Central Railroad Company, Appellee

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division

Decided June 14, 1948

Before Allen, McAllister and Miller, Circuit Judges

Allen, Circuit Judge. This is an appeal from an order of the District Court sustaining a motion to dismiss an action for personal injuries, upon the ground of improper venue. The facts are presented mainly by deposition and physical exhibits, and are not controverted.

[fol. 69] The appellant was employed by the appellee as an engine hostler. He was injured in Wesleyville, a suburb of Erie, Pennsylvania, while working on the tender of a locomotive. He filed an action alleging that while he was engaged in filling the tender with water, the locomotive was suddenly started without warning, causing him to be seriously injured.

The case arises under the Federal Employers' Liability Act, 45 U.S.C., 51 et seq.

The accident occurred on May 14, 1945, and appellee's claim agent called upon the appellant several times, in the course of which negotiation appellant asked for some money as an advance for "living expenses". Appellant's claim agent said: "He asked me if we could help him out • • • he asked me if the company would allow him something to help him out on his expenses • • • I told him I would put it up to the company to see what they would be willing to do • • • I believe he asked for 50 or 75 dollars. • • • I told him I would try to get the money for him." The claim agent testified that a couple of weeks later "after some little preliminary conversation I told him that the company had made an allowance of fifty bucks • • • for expenses; to help him out on his expenses."

The claim agent brought the appellant $50 for living expenses, and at the same time told him that "in order to get this money we would have to have a little agreement signed up." The appellant read and signed the following agreement:

[fol. 70] "AGREEMENT FOR ADVANCEMENT OF FUNDS" —

"At my request, the New York Central Railroad Company has advanced to me the sum of Fifty Dollars ($50.00), receipt of which is hereby acknowledged, for living and other expenses while I am disabled from work by reason of personal injury sustained by me; at or near Wesleyville, Pa., on or about the 14th day of May, 1945.

"In consideration of said advancement, I agree with the said Railroad Company that I will endeavor, in good faith, to adjust and settle any claim I may have for my injuries without resorting to litigation. If my claim cannot be so adjusted, then in further consideration of said advancement, I promise and agree that I will not start suit against the said Railroad Company to recover damages for my injuries

in any courts, either Federal or State, except those sitting within the State where my injuries were sustained or within the State where I resided at the time of my injury, and I covenant with the said The New York Central Railroad Company that I will not start suit against it for damages on account of my said injuries in any court sitting outside of the State of my residence at the time of the said injuries or outside of the State wherein my said injuries occurred.

"Dated at Erie, Pa., this 18th day of February, 1946.

"Blaine F. Akerly."

It does not appear that any later advance of expenses was made, and on January 31, 1947, the appellant filed an [fol. 71] action in the Northern District of Ohio, Eastern Division. A motion to dismiss was filed, based upon the above agreement, and the District Court dismissed the action.

The appellant contends, (1) that the agreement was void under Sect. 5 of the Federal Employers' Liability Act, 45 U.S.C., sect. 55, and, (2) that it was void for want of consideration.

The pertinent portions of Sect. 5 and 6 of the statute read as follows:

> Sec. 5. "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."
>
> Sec. 6 • • •
>
> "Under this chapter an action may be brought in a district court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

[fol. 72] As is evident, Sec. 6 of the Act gives an injured railroad employee three separate and distinct choices as to the district in which he will file his action.

The contract signed by appellant agreed that the suit should be filed only in the district where the appellant was injured, and the principal question is whether this contract attempted to exempt the appellee from any liability created by the Act.

The Employers' Liability Act of 1908, which was held valid in the Second Employers' Liability Cases, 223 U. S. 1, did not include the present venue provisions of Sect. 6. Venue under that Act was covered by the general provisions of the federal venue statutes, 28 U.S.C., Sec. 112. The present provision was added by amendment in 1910, and as declared in *Baltimore & Ohio Rd. Co.* v. *Kepner*, 314 U. S. 44, 53, the statute was broadened because "the general venue provisions worked injustices to employees." The later and broader venue provisions were in large part waived by the appellant in the contract signed in connection with the advance for living expenses. If this contract, which was secured by the appellee from a man who obviously was in need of financial assistance, is a device to create exemption from liability it is invalid. *Davis* v. *Crane*, 12 Fed. (2d) 355, 358 (C.C.A. 8).

The case authority on this question is in sharp conflict. District Courts in Missouri, Illinois, and Minnesota, and the Supreme Court of Minnesota, have held that such contracts are valid. *Herrington* v. *Thompson*, 61 Fed. Supp. 903 (Mo.); *Roland* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 65 Fed. Supp. 630 (Ill.); *Clark* v. *Lowden*, 48 Fed. Supp. 261 (Minn.); *Detwiler* v. *Lowden*, 198 Minn. 185. District [fol. 73] Courts in Illinois, Minnesota, and Iowa, and the Supreme Court of Utah, have held that such contracts are invalid. *Sherman* v. *Pere Marquette Ry. Co.*, 62 Fed. Supp. 590 (Ill.); *Fleming* v. *Husted*, 68 Fed. Supp. 900 (Ia.); *Peterson* v. *Ogden Union Ry. & Depot Co.*, 175 P. (2d) 744. Cf. *Porter* v. *Fleming*, 74 Fed. Supp. 378 (Minn.). In the latter case the contract was very similar to the one herein involved. With due respect for the courts first named, we think that the latter cases state the sounder rule, and that under the clear intendment of the Act this contract is void.

Under the conceded facts, it is a fair inference that the appellee regarded this contract as important for the sake

of exempting itself from the liability of being sued in New York, the state of its residence, or in any of the states, other than Pennsylvania, where it does business. Section 6 creates new and important rights in the employee and it created corresponding liabilities against the employer. Appellee argues that liability, within the meaning of the Act, is the determination of the obligation of the appellee to pay damages, and that it is in no way affected by the place or forum of trial. But liability is an ordinary word, to be construed according to its ordinary meaning. The second, and more limited definition of the word, as found in Webster's Unabridged Dictionary (2d ed.), 1935, is in substance that urged by the appellee; but the first, and more inclusive definition is "The state or quality of being liable." Liable, in turn, is defined as being "bound or obliged in law or equity; responsible; * * * answerable or exposed to a certain contingency or casualty of an undesired character." Within these definitions, the appellee was liable under Sect. 6 of the Act to be sued in any one of three jurisdictions: that of its residence, that where the accident [fol. 74] occurred, that where it does business. In fact this new venue statute creates, within the ordinary meaning of the word, liability against the employer in states and districts where he could not have been sued prior to the amendment. The paragraph is broad and sweeping, and as pointed out in *Duncan* v. *Thompson*, 315 U. S. 1, the adoption of the section in its present from "argues persuasively that Congress wanted section 5 to have the full effect that its comprehensive phraseology implies." As specifically held in the cited case, Sec. 5 is applicable to existing causes of action.

We think that the inclusion of this section in the Employers' Liability Act, with its creation of new obligations against the employer, makes the venue provision an inherent part of the employer's liability. An attempt to limit it by contract is an attempt to exempt the railroad from liability and is void.

The contract signed was not a release, compromise or settlement of the cause of action, either in whole or in part, and therefore *Callen* v. *Pennsylvania Rd. Co.*, 332 U. S. 625, relied on by the appellee, has no application.

Also we think that public policy prohibits the recognition and enforcement of such contracts limiting the right of parties in their access to the courts. Like the rights be-

stowed upon employees under the Fair Labor Standards Act, the rights of the employee under the Federal Employers' Liability Act were "statutory rights conferred upon private parties but affecting the public interest." It was held in *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, that such rights may not be released or waived.

[fol. 75] The contract to waive the venue provisions is of no effect also because there was no consideration for it. The District Court agreed that the sum paid was not in itself consideration, since it was to be considered an advance, and hence was deductible from the amount of the final settlement. The finding that the sum was to be considered an advance is clearly correct, for the railroad, which drew the contract, headed it "Agreement for Advancement of Funds," and stated that at appellant's request the railroad had "advanced" the sum of $50. The specific provision of Sec. 5 of the Act making this amount deductible from the final settlement, under the well-established rule, is read into and made part of the contract of the parties. In light of this finding, and in view of the appellee's acknowledgement, implicit in the wording of the contract which it secured, that it owed the appellant more than $50, nothing was paid for the promise to limit the venue.

The judgment of the District Court is reversed and the case is remanded for further proceedings in accordance with this opinion.

MILLER, Circuit Judge, dissenting:

The case involves a question of venue, rather than jurisdiction or liability. It is settled that venue provisions, being for the benefit of the parties, can be waived. *Neirbo Co. vs. Bethlehem Shipbuilding Corp.*, 308 U. S. 165.

Regardless of statutory venue provisions, the parties can select their trial court, provided the court selected has jurisdiction of the subject matter and the defendant, See *Industrial Association vs. Commissioner*, 323 U. S. 310, 313. Unless Section 5 of the Act changes the rule in this particular type of case, the agreement in this case, if supported by consideration, is valid.

[fol. 76] I do not construe a contract, merely restricting venue not unreasonably as being a contract or device by the carrier "to exempt itself from any liability created by"

the act. *Herrington vs. Thompson*, 61 Fed. Supp. 903, 904; *Clark vs. Lowden*, 48 Fed. Supp. 261; *Roland vs. Atchison, T. & S. F. Ry. Co.*, 65 Fed. Supp. 630. Under such a contract the carrier's "liability" in its entirety still exists, and can be enforced by the employee in a court provided by the statute. The statute gives the employee a selection of venue, which selection is exercised when suit is filed. Under the contract in question he makes the selection at an earlier time. No question is involved about the selection being an unreasonable one, or operating as a hardship in any way on the employee, or being procured by fraud, misrepresentation, or duress in any degree.

Exemption from liability is entirely different from a settlement, either in whole or in part, of an existing liability. See *Bay State Dredging & Contracting Co. vs. Portz*, 156 Fed. (2d) 827, 832; *Duncan vs. Thompson*, 315 U. S. 1. In *Callen vs. Pennsylvania R. R. Co.*, 332 U. S. 625, the Supreme Court held that a release secured by a carrier of an existing liability under the Act was not a device to exempt itself from liability barred by Section 5 of the Act. The majority opinion in the present case construes the venue provisions of Section 5 as part of the carrier's "liability" under the Act. If the carrier's entire liability can be settled, it would seem that a portion of it could likewise be settled.

I also believe that the contract is supported by consideration. The $50.00 was not a part payment of any admitted liability, but was advanced "for living and other expenses." There is no provision that it was to be credited on any judgment or settlement that the em- [fols. 77-78] ployee might obtain. In any event, there was no obligation on the carrier to pay *at that time* whatever ultimately might be agreed upon or adjudged by the court. Payment in advance of the time when it is legally due constitutes good consideration.

[fol. 21] PROOF OF SERVICE

Cal, No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

COUNTY OF KENT, ss:

Ethel J. Klaassen, being duly sworn, deposes and says that she is an employe of The American Brief and Record Company of Grand Rapids, Michigan; that pursuant to instructions from John Mechem, one of the attorneys for Defendant and Appellee, and on behalf of said attorney, she did on the 16th day of July, A. D. 1948, serve copies of Application for rehearing in the above entitled cause upon the following parties, by mailing same at Grand Rapids postoffice, postage prepaid, and addressed as follows:

24 copies to: Mr. Jay Mertz, Clerk, Supreme Court, Lansing, Michigan.

1 copy to: George F. Gronewold, 1514 Security Nat'l Bank Bldg., Battle Creek, Michigan.

1 copy to: H. Victor Spike, 441 E. Jefferson Ave., Detroit, Michigan.

1 copy to: Forbes B. Henderson, 441 E. Jefferson Ave., Detroit, Michigan.

Ethel J. Klaassen.

Subscribed and sworn to before me this 16th day of July, A. D. 1948. Anne M. Noel, Notary Public, Kent County, Mich. My commission expires June 15, 1952.

[fol. 22] [Stamp:] Received Jul. 24, 1948. Jay Mertz, Clerk, Supreme Court

IN THE SUPREME COURT, STATE OF MICHIGAN

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Cal. No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

OBJECTIONS TO APPLICATION FOR REHEARING

George F. Gronewold, Attorney for Plaintiff and Appellant, 1514 Security Nat'l Bk. Bldg., Battle Creek, Michigan.

H. Victor Spike, Forbes B. Henderson, Of Counsel, 441 E. Jefferson Avenue, Detroit, Michigan.

[fol. 23] May it Please the Court:

A rehearing should be denied for the reasons that no new facts are presented, nothing new has been added except citing one more decision (Akerly vs. New York Central) upholding the theory of Defendant and Appellee, which theory has been rejected by this Honorable Court.

The agreement in the Akerly case is quite different from those involved in the instant case, and this probably had some bearing on Judge Allen's conclusions that the agreement was without consideration. There the advancement in reality was nothing but a gift because nothing was said about refunding it out of any future settlement or judgment. It contained no reservation of the question of liability as does ours.

The weight of authority is to the effect that this Honorable Court is not bound by the decisions of the United States District Courts or Circuit Courts of Appeal, and I refer

to the same volume of Appellee's citation: Home Insurance Company of New York vs. Northern Pacific Railway Company, 147 A. L. R. 849, at page 855, a Washington Supreme Court decision:

> "When a federal statute is construed by a United States Court of Appeals, such construction is entitled to great weight with us when the same statute is involved in a case we are considering, *but it is not binding on us if we do not deem it logical or sound.* There are some cases and texts which state broadly that the decisions of "federal courts" construing federal statutes are binding on the state courts, but an examination of them will disclose that what is referred to is the United States Supreme Court, not the federal courts generally. We have found no case in which the question has been squarely presented holding that decisions of the inferior federal courts on any federal question are binding on the state courts, or are anything more than persuasive and entitled to great weight." (Italics supplied.)

See also Annotations on the same subject: 147 A. L. R. at page 858 for the weight of authority and majority view holding that state courts are not bound by the decisions of the lower federal courts even though a federal question is involved.

[fol. 24] The Federal Statute (Sec. 56) gives State Courts and Federal Courts concurrent jurisdiction. Appellee recognizes that the decision of one Court is not binding on another when they rely on Sherman vs. Pere Marquette, 62 F. Supp. 590, decided Oct. 2, 1945, in the Northern District Court of Illinois, Eastern Division, while on April 17, 1946, Roland vs. Santa Fe, 65 F. Supp. 630, decided in the same District Court adopted the theory of Appellant.

The Michigan cases cited by Appellee in the Application for Rehearing are governed by United States Supreme Court decisions, with one or two exceptions, and in these it is only implied that the Michigan Supreme Court might follow the decisions of the lower Federal Courts.

We contend that while the decisions of the United States Supreme Court are binding on this Honorable Court, the decisions of the lower Federal Courts are not, and this Court

can exercise its own discretion and judgment in the matter at issue.

We respectfully submit that the Application for Rehearing should be denied.

Respectfully submitted, George F. Gronewold, Attorney for Plaintiff and Appellant.

H. Victor Spike, Forbes B. Henderson, Of Counsel.

[fols. 83-85] In the Supreme Court of Michigan

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

[Title omitted]

Appellee's Reply to Appellant's Objections to Appellee's Application for Rehearing

We must respectfully point out two erroneous statements or concepts in Appellant's Objections, viz:

I

Appellant refers to the case of *Akerly vs. New York Cent. R. R.*, 73 F. Supp. 903 (reversed by the United States Circuit Court of Appeals, 6th Circuit, June 14, 1948, not yet reported—decision of the Court of Appeals shown as Exhibit 1, Appellee's Application for Rehearing). [fol. 86] Appellant states that the agreement in the *Akerly* Case differs from the agreement in the case at bar, because the *Akerly* agreement did not state that the amount advanced the employee could be deducted from the amount finally paid him for his injuries. However, the Federal Employers' Liability Act (45 U. S. C. A. Sec. 55) specifically states that such payments shall be deducted.

As the United States Court of Appeals points out, in the *Akerly* Case:

> "The specific provision of Sec. 5 of the Act (45 U. S. C. A. Sec. 55) making this amount deductible from the final settlement, under the well established rule, is read into and made part of the contract of the parties."

In the case at bar, the question whether the two payments of $50,00 each to Boyd were a valid consideration for the venue-limiting agreements, can only properly be raised when the parties plead to the merits, in the trial court finally found to possess jurisdiction of the action. The jurisdictional question (whether the Michigan Chancery Court can enjoin the law action in the Illinois State Court under the federal statute) must first be disposed of.

The United States Circuit Court of Appeals, 6th Circuit, decided that question adversely to the appellant in the *Akerly* Case. We quote from that decision:

> "The contract signed was not a release, compromise or settlement of the cause of action either in whole or in part and therefore *Callen v. Pennsylvania Rd. Co.* 332 U. S. 625, relied on by the appellee, has no application.
>
> "Also we think that public policy prohibits the recognition and enforcement of such contracts limiting [fol. 87] the right of parties in their access to the courts. Like the rights bestowed upon employees under the Fair Labor Standards Act, the rights of the employee under the Federal Employers' Liability Act, were 'statutory rights conferred upon private parties but affecting the public interest'. It was held in *Brooklyn Savings' Bank v. O'Neil*, 324 U. S. 697, that such rights may not be released or waived."
>
> *Akerly vs. New York Central R. R.*, U. S. Circuit Court of Appeals, 6th Circuit, June 14, 1948. Not yet reported.

II

The case of *Home Ins. Co. vs. No. Pacific Ry.*, 140 P. (2d) (Wash.) 507, cited by Appellant in its Objections, is not in point.

That decision, by the Washington Supreme Court, merely held that it was not bound to follow the federal decision in *China Fire Ins. Co. vs. Davis*, 50 F. (2d) 389, which was in the United States Circuit Court of Appeals, for the *Second* Circuit. The State of Washington is in the *Ninth* United States Judicial Circuit. The question whether the Washington Supreme Court would be bound by a decision on a federal statute by the United States Circuit Court of Appeals, *Ninth* Circuit, was not involved in, nor decided by, the *Home Ins. Co.* Case.

It is manifest that, if there are to be two contrary rules of interpretation of a federal statute in the same *federal district or circuit*—one by the federal courts of that district or circuit, and the contrary by the state courts in the *same* district or circuit—intolerable confusion will result.

[fol. 88] It would be a solemn and serious act for the Michigan Supreme Court to create such confusion, by finally determining the case at bar directly at variance with the 6th Circuit Court of Appeals in the *Akerly* case.

It would require this honorable court to overturn a long series of cases and an established rule of law in this state. Michigan has never followed the rule expounded in the *Home Ins. Co.* Case. It has held to the contrary many times.

Brazil vs. Thompson, 141 Mich. 628 (1905), was assumpsit for patent royalities. The United States (then) Circuit Court in Michigan had held the patent valid in 1889. The United States Circuit Court in Wisconsin had held the patent invalid in 1898. Judgment for the patentee was affirmed, this court saying:

> "Undoubtedly, the effect of the decree of the United States Circuit Court for the western district of Wisconsin was final within the territory over which its jurisdiction extended, and, in the absence of the prior decree of the United States circuit court for the eastern district of Michigan, it would have been of high persuasive and, perhaps, controlling force throughout the land. But the former court could not invalidate the decree of the latter court, save in its own territory, and notwithstanding its decree, the plaintiff's patents remained valid within the territory, subject to the jurisdiction of the Federal court in Michigan, and inconcluded, save only in the territory of the Wisconsin Court, until the questions at issue should be settled by the decision of the Supreme Court of the United States."

Brazil vs. Thompson, 141 Mich. at page 634.

The Federal Employers' Liability Act has been considered by this court.

[fol. 89] "Whenever congress enacts statutes pursuant to its power under the commerce clause, such laws, when enforced in both State and Federal courts, must be construed in the light of Federal decisions, and the decisions of the State courts do not govern

if they differ therefrom. See 1 Roberts' Federal Liabilities of Carriers, Sec. 557, and cases there cited."

Howe vs. Railroad Co., 236 Mich. at page 587.

"The statute in question being a Federal statute, we should be governed in its construction by the decisions of the Federal courts. No decision of the United States Supreme Court involving the precise question has been called to our attention."

Bement vs. Gd. Rapids Etc., R. Co., 194 Mich. at pages 65 and 66.

"This action being brought under the so-called Federal Employers' Liability Act of 1908 and amendments thereto, that statute and decisions of the Federal courts upon it are controlling."

Gaines vs. Grand Trunk R. Co., 193 Mich. at page 405.

"Is the defendant a 'common carrier by railroad' within the meaning of the Federal Employers' Liability Act? In the determination of this question, and in attempting to ascertain what the legislative intent of congress was in passing the act in question, we will necessarily be governed by the Federal decisions."

Nelson vs. Ironwood etc., Co., 204 Mich. at page 351.

"Congress is given power to regulate commerce between the States, and when it has acted, as in passing the Federal Employers' Liability Act, such enactment [fol. 90] becomes the general law of the land and supersedes all State laws upon the same subject."

Jorgenson vs. Grand Rapids etc., R., 189 Mich. at page 539.

Conclusion

We respectfully believe that this honorable court should and will reverse its decision of June 29th in the case at bar, in the light of the final holding in the *Akerly* case, and because of it.

Respectfully submitted, Meehem & Meehem, Attorneys for Defendant and Appellee.

Melvin L. Griffith, Walter N. Murray, of Counsel.

[fol. 26] (Original to Clerk, Supreme Court)

Proof of Service

Cal. No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

COUNTY OF KENT, ss.

Ethel J. Klaassen, being duly sworn, deposes and says that she is an employe of The American Brief and Record Company of Grand Rapids, Michigan; that pursuant to instructions from John Mechem, one of the attorneys for Defendant and Appellee, and on behalf of said attorney, she did on the 28th day of July, A. D. 1948, serve copies of Appellee's Reply to Appellant's Objection to Application for Rehearing in the above entitled cause upon the following parties, by mailing same at Grand Rapids postoffice, postage prepaid, and addressed as follows:—

24 copies to: Mr. Jay Mertz, Clerk, Supreme Court, Lansing, Michigan.

2 copies to: H. Victor Spike, Forbes B. Henderson, 441 E. Jefferson Ave., Detroit, Michigan.

1 copy to: George F. Gronewold, 1514 Security Nat'l Bank Bldg., Battle Creek Michigan.

Ethel J. Klaassen.

Subscribed and sworn to before me this 28th day of July, A. D. 1948. Anne M. Noel, Notary Public, Kent County, Mich. My commission expires June 15, 1952.

[fol. 27] At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fourth day of October, in the year of our Lord one thousand nine hundred and forty-eight.

Present the Honorable George E. Bushnell, Chief Justice; Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North, John R. Dethmers, Henry M. Butzel, Leland W. Carr, Associate Justices.

43966

GRAND TRUNK WESTERN RAILROAD COMPANY,

vs.

ALEXANDER BOYD

A motion for rehearing having been heretofore submitted herein, it is hereby denied, with costs to plaintiff.

STATE OF MICHIGAN, ss.

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 22nd day of October, in the year of our Lord one thousand nine hundred and forty-eight.

Jay Mertz, Clerk. (Seal.)

[fol. 28] IN THE SUPREME COURT, STATE OF MICHIGAN.

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Calendar No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

Notice of Motion

To: George F. Gronewold, Attorney for Plaintiff and Appellant. Business Address: 1514 Security Bank Building, Battle Creek, Michigan.

H. Victor Spike, Forbes B. Henderson, of Counsel. Business Address: 441 E. Jefferson Avenue, Detroit, Michigan.

SIRS:

You will please to Take Notice that the annexed is a copy of a motion this day filed in the above entitled cause, and that annexed hereto is copy of the affidavit this day filed in said cause upon which said motion is based; and that said motion will be brought on for hearing in said Supreme Court on Tuesday, the 19th day of October, 1948, at the opening of said Court on said day, or as soon thereafter as counsel can be heard.

Dated: October 11, 1948.

Mechem & Mechem, by J. L. Mechem, Attorneys for Defendant and Appellee. Business Address: 804 Michigan National Bank Building, Battle Creek, Michigan.

Melvin L. Griffith, Walter N. Murray, of Counsel. Business Address: 139 North Clark Street, Chicago 2, Illinois.

[fol. 29] In the Supreme Court, State of Michigan

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Calendar No. 43966

Grand Trunk Western Railroad Company, a Michigan Corporation, Plaintiff and Appellant,

vs.

Alexander Boyd, Defendant and Appellee

Motion for Stay of Proceedings Pending Application for Writ of Certiorari to the Supreme Court for the United States

Comes now Alexander Boyd, the above-named appellee, by Mechem & Mechem, his attorneys, and moves this honorable Court to enter its order staying all proceedings under its decree in the aforesaid cause pending the appeal of said cause, and until the further order of this court, or of the Supreme Court of the United States, for the following reason:

Said appellee is preparing and is about to file his application to the Supreme Court of the United States for a Writ of Certiorari from said Court in said cause.

Mechem & Mechem, by J. L. Mechem, Attorneys for Defendant and Appellee. Business Address: 804 Michigan National Bank Building, Battle Creek, Michigan.

Melvin L. Griffith, Walter N. Murray, of Counsel. Business Address: 139 North Clark Street, Chicago 2, Illinois.

[fol. 30] IN THE SUPREME COURT, STATE OF MICHIGAN

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Calendar No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF MICHIGAN,
County of Calhoun, ss:

J. L. Mechem, being first duly sworn, deposes and says:

That he is one of the attorneys of record for Alexander Boyd, the above-named appellee;

That deponent has been instructed to prepare and file on behalf of said appellee an appeal from the decree of the Supreme Court of Michigan to the Supreme Court of the United States in the aforesaid cause; and deponent is now preparing and is about to file application to the Supreme Court of the United States for its Writ of Certiorari in the aforesaid cause;

That it is necessary and proper that all proceedings in the aforesaid cause be stayed by order of the Supreme Court of Michigan pending such appeal to the Supreme Court of the United States.

J. L. Mechem.

Subscribed and sworn to before me this 11th day of October, A. D. 1948. Sadie S. Clemons, Notary Public in and for the County of Calhoun, State of Michigan. My commission expires Feb. 12, 1949.

[fol. 31] IN THE SUPREME COURT, STATE OF MICHIGAN

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Calendar No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

PROOF OF SERVICE OF NOTICE OF MOTION

STATE OF MICHIGAN,
County of Calhoun, ss:

J. L. Mechem, being first duly sworn, deposes and says:

That he is one of the attorneys of record for Alexander Boyd, the above-named Defendant and Appellee;

That on behalf of said Appellee and on the 11th day of October, A. D. 1948, he served on George F. Gronewold, 1514 Security National Bank Building, Battle Creek, Michigan, and on H. Victor Spike and Forbes E. Henderson, 441 E. Jefferson Avenue, Detroit, Michigan, the attorneys for the above-named Plaintiff and Appellant, true copies of Motion for stay of Proceedings and affidavit in support thereof, and Notice of Hearing on said Motion, all dated October 11, 1948, by depositing same in the United States Postoffice, enclosed in sealed wrappers, addressed to said attorneys at their aforesaid business addresses, with postage thereon fully prepaid. True copies of said Motion, Affidavit and Notice are hereto annexed and incorporated herein by reference.

J. L. Mechem.

Subscribed and sworn to before me this 11th day of October, A. D. 1948. Sadie S. Clemons, Notary Public in and for the County of Calhoun, State of Michigan. My commission expires Feb. 12, 1949.

[fol. 32] At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twenty-first day of October, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable George E. Bushnell, Chief Justice; Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North, John R. Dethmers, Henry M. Butzel, Leland W. Carr, Associate Justices.

43966

Grand Trunk Western Railroad Company, Plaintiff and Appellant,

vs.

Alexander Boyd, Defendant

In this cause a motion is filed by defendant for a stay of proceedings, and nothing in opposition thereto having been filed by plaintiff, and due consideration thereof having been had by the Court, It is ordered that all proceedings in said cause except the injunction (which shall remain in full force and effect) be stayed pending determination of appellees application to the United States Supreme Court for writ of certiorari.

State of Michigan, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 21st day of October, in the year of our Lord one thousand nine hundred and forty-eight.

Jay Mertz, Clerk. (Seal.)

[fol. 33] In the Supreme Court, State of Michigan

43966

Grand Trunk Western Railroad Company, Plaintiff and Appellant,

vs.

Alexander Boyd, Defendant

In the Supreme Court, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record, and of all proceedings had and determined in the above entitled cause, by said Supreme Court, including the written decision and reasons therefor, signed by the Justices of said Court, and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at the City of Lansing, this 12th day of November, in the year of our Lord, one thousand nine hundred and forty-eight.

Jay Mertz, Clerk. (Seal.)

[fol. 99] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 6, 1949

The petition herein for a writ of certiorari to the Supreme Court of the State of Michigan is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. ~~1948.~~ '49

No. ~~[redacted]~~ 17

ALEXANDER BOYD,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND BRIEF IN SUPPORT THEREOF.

MELVIN L. GRIFFITH,
Chicago, Illinois,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
FRANCIS H. MONEK,
Chicago, Illinois.

JOHN L. MECHEM,
Battle Creek, Michigan.
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No.

ALEXANDER BOYD,

Petitioner,

VS.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The Petitioner, Alexander Boyd, respectfully petitions this Honorable Court as follows:

1. To review the judgment of the Supreme Court of Michigan in the above cause which judgment was entered June 29th, 1948 and became final upon the denial by that court of Petitioner's application for a rehearing on October 4th, 1948 (R. 57, 92);

2. For a writ of Certiorari to the Supreme Court of Michigan for that purpose.

In this behalf, Petitioner shows:

I.

OPINION BELOW.

Grand Trunk Western R. Co. v. *Boyd*, 321 Mich. 693; 33 N. W. (2d) 120, (R. 52).

II.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Nature of the Action.

This is a suit in Chancery (R. 17) brought in the Circuit Court of Calhoun County, Michigan by Grand Trunk Western Railroad Company, a Michigan Corporation (Respondent) against Alexander Boyd (Petitioner), for an injunction restraining Petitioner from the further prosecution of a suit brought by him in the Superior Court of Cook County, Illinois, against Respondent, under The Federal Employers' Liability Act, 45 U. S. C. A., Sections 51-60, to recover damages suffered by him for injuries received while employed by Respondent, in its Nichols Yards at Battle Creek, Michigan, on November 23, 1946 (R. 5, 17-18, 27; Appendix, page 31).

The basis of the relief sought by Respondent in the Michigan suit, was two agreements, reciting the advancement to Petitioner, by Respondent of Fifty Dollars on each of two occasions, for living and other expenses while Petitioner was disabled on account of his injuries.

The agreements provided that in the event Petitioner's claim could not be settled, suit would be filed only in the

county or district where he resided at the time of his injuries or in the county or district where his injuries were sustained (R. 25-27).

An order for a temporary injunction was entered in accordance with the prayer of the Complaint (R. 23) by the Calhoun County, Michigan, Circuit Court, on July 17th, 1947 (R. 30).

Petitioner moved to dissolve the temporary injunction, to quash the summons and to dismiss the suit on the ground that (R. 32, 34, 36):

> The effect of the agreements set up in the Bill of Complaint is to exempt the Plaintiff from a liability created by Section 6 of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 56) and they are void to that extent under Section 5 of said Act (45 U. S. C. A., Section 55).

The trial court held the contracts invalid on this ground and on the further ground that petitioner's privilege granted to him by Section 6 (45 U. S. C. A., Sec. 56) to sue his employer in the Superior Court of Cook County where it was carrying on its business, could not be interfered with for reasons of inconvenience, and expense, as held by this court in *Baltimore and Ohio R. Co.* v. *Kepner*, 314 U. S. 44 and *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698 (R. 46, 47).

On appeal the errors relied upon by Grand Trunk Western were (R. 16):

> 1. The trial court erred in holding that the contracts entered into between plaintiff and defendant are void under the provisions of the Federal Employers' Liability Act, 45 U. S. C. A., Sections 55, 56.
> 2. The Court erred in holding that the contracts entered into between plaintiff and defendant did not furnish a sufficient basis for injunctive relief.

Decision of the Supreme Court of Michigan.

The Supreme Court of Michigan held the contracts valid and in reversing the judgment of the trial court said (R. 54):

> We must consider the meaning of the word "liability" as used in Section 55 in question and on the determination of the construction to be given that word will depend the result of this case.

The Court's reasoning appears as follows (R. 55-56):

> "Our attention has not been directed to any case which used the word 'liability' as meaning venue, excepting the four (fol. 17) cases cited by defendant: *Peterson* v. *Ogden Union Railway & Depot Co.*—Utah— (175 Pac. (2d) 744); *Sherman* v. *P. M. Ry. Co.*, 62 Fed. Supp. 590; *Fleming* v. *Husted*, 68 Fed. Supp. 900; and *Krenger* v. *Pennsylvania R. Co.*, 8 F. R. D. 65.
>
> To an effect contrary to the above four cases, the following construe the word liability in such a manner as to result in upholding the two contracts in question; *Detwiler* v. *Lowden*, 198 Minn. 185 (269 N. W. 367); *Detwiler* v. *Chicago R. I. & P. Ry. Co.*, 15 Fed. Supp. 541; *Clark* v. *Lowden*, 48 Fed. Supp. 261; *Herrington* v. *Thompson*, 61 Fed. Supp. 903; *Roland* v. *Atchison, T. & S. F. Ry. Co.*, 65 Fed. Supp. 630; *Akerly* v. *N. Y. Cent. R. Co.*, 73 Fed. Supp. 903 (16 L. W. 2175).
>
> There are reasons why Congress should interest itself in prohibiting contracts that would evade liability for damages or contracts requiring employees to waive such liability as a condition of employment; but there is no apparent reason why Congress should interest itself in prohibiting a fair and reasonable contract made without fraud after a cause of action has accrued.
>
> • • • • • •
>
> Section 51 of the chapter (hereinbefore quoted) declares the matters for which the employer is 'liable' and that liability is for injuries sustained by an employee. That liability in its various forms is plainly the liability contemplated in section 55 in question."

The Court reversed the judgment of the lower Court, entered a decree restoring the temporary injunction as granted by the lower Court and remanded the cause to that Court for further proceedings (R. 56).

III.

JURISDICTIONAL STATEMENT.

This Court's jurisdiction is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Sections 1257 and 1651, effective as of September 1, 1948.

The judgment to be reviewed is a final judgment rendered by the highest court of the State of Michigan in which a decision could be had.

The judgment is a decision as to rights, privileges and immunities specially set up or claimed by petitioner under a United States Statute, the Federal Employers' Liability Act, 35 Stat. 65 (45 U. S. C. A., Sections 51-60), April 22, 1908, as amended, with particular reference to Sections 5 and 6 (Appendix, page 31).

IV.

THE QUESTIONS PRESENTED.

The ultimate question to be decided is:

> Were the contracts entered into between Petitioner and Respondent in the circumstances of this case, void under Section 5 of the Federal Employers' Liability Act, 35 Stat. 66 (45 U. S. C. A., Section 55) for the reason that their effect was to enable Respondent to exempt itself from a liability created by Section 6, 36 Stat. 291 (45 U. S. C. A., Section 56) of the Act?

V.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The rights, privileges and immunities set up or claimed by petitioner are given by the Federal Employers' Liability Act, a statute of the United States.

There is great diversity of opinion amongst the courts, State and Federal, as to the validity of contracts such as are here involved and as to the proper construction to be placed upon Sections 5 and 6 of the Act, in determining whether they are valid or invalid.

The cases in which courts have held such contracts as those here involved, invalid, are:

Sherman v. *Pere Marquette R. Co.*, 62 F. Supp. 590 (1945).

Peterson v. *Ogden Union Ry. & Depot Co.*, 175 Pac. (2d) 744 (1946).

Fleming v. *Husted*, 68 F. Supp. 900 (1946).

Porter v. *Fleming*, 74 F. Supp. 378 (1947).

Krenger v. *Penn. R. Co.*, 8 F. R. D. 65 (1947).

Akerly v. *New York Central R. Co.*, 168 F. (2d) 812 (1948).

The courts in these cases rely, in the main, on *Duncan* v. *Thompson*, 315 U. S. 1 (1942).

This court, in the *Duncan* case held that the words "any contract" in Section 5 included contracts made after the cause of action arose as well as those made before. The courts holding such contracts valid have, in the main, overlooked this point in the case.

This court held that the contract in the *Duncan* case was invalid. For the reason that the effect of the contract there

involved was to deprive the injured man of the right to sue at all until he had repaid the amount advanced to him, the courts holding the contracts valid, have sought to distinguish the *Duncan* case from the cases involving contracts to sue only in particular courts or at particular places.

The cases in which such courts have held such contracts valid are:

Detwiler v. *Chicago R. I. & P. R. Co.*, 15 F. Supp. 541 (1936).

Detwiler v. *Lowden*, 198 Minn. 185 (1936).

Clark v. *Lowden*, 48 F. Supp. 261 (1942).

Herrington v. *Thompson*, 61 F. Supp. 903 (1945).

Roland v. *A. T. & S. F. Ry. Co.*, 65 F. Supp. 630 (1946).

Akerly v. *N. Y. C. R. Co.*, 73 F. Supp. 903 (1947).

The *Akerly* case was reversed in *Akerly* v. *N. Y. C. R. Co.*, 168 F. (2d) 812 (1948).

This divergence of opinion as to whether contracts such as those here involved are valid or invalid under Section 5 and the apparent confusion of some of the courts as to the correct interpretation of this Court's decision in *Duncan* v. *Thompson*, 315 U. S. 1, together with the nature and source of the rights, privileges and immunities involved, furnish urgent and important reasons for a review of this case by this Court.

Prayer.

Wherefore, for the reasons above given, petitioner respectfully prays that a writ of certiorari be issued to the Supreme Court of the State of Michigan to the end that this cause may be reviewed and determined by this Court and that the judgment of the Supreme Court be reversed and for such other and further relief as to the Court shall seem just.

MELVIN L. GRIFFITH,
Attorney for Petitioner,
Alexander Boyd.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1948.

No. .....

ALEXANDER BOYD,
Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

Grand Trunk Western R. Co. v. *Boyd*, 321 Mich. 693, 33 N. W. (2d) 120. (R. 52)

II.

JURISDICTIONAL GROUNDS.

The jurisdiction of this Court is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Sections 1257 and 1651.

The Supreme Court of Michigan has rendered a final judgment interpreting Section 5 of The Federal Employ-

ers' Liability Act, 35 Stat. 66 (45 U. S. C. A., Section 55) in a manner probably not in accord with this Court's decision in *Duncan* v. *Thompson*, 315 U. S. 1 and contrary to a decision of the United States Court of Appeals, Sixth Circuit in *Akerly* v. *New York Central R. Co.*, 168 F. (2d) 812.

There is a great divergence of judicial opinion (see Petition, pages 6-7) as to the interpretation of Section 5 on the question here presented, and it is of fundamental importance in the administration of the Federal Employers' Liability Act that this Court exercise its supervisory power to resolve the question and finally determine the full scope of the words "Any Liability created by this chapter," as used in that provision. *Duncan* v. *Thompson*, 315 U. S. 1, 5, 62 Sct. 422, 423.

Statutes Involved.

1.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * * *

(3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

* * *

The Supreme Court and all Courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law. *New Title 28, United States Code, Judiciary and Judicial Procedure*, Secs. 1257 and 1651, Public Law 773, 80th Cong., Ch. 81, page 67 and Ch. 111, page 84.

2.

Section 5, 35 Stat. 66 (45 U. S. C. A., Section 55):

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void:
> • • •

3.

Section 6, 36 Stat. 291 (45 U. S. C. A., Section 56):

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. Apr. 22, 1908, c. 149, 6, 35 Stat. 66; Apr. 5, 1910, c. 143, 1, 36 Stat. 291; Mar. 3, 1911, c. 231, 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, 2, 52 Stat. 1404.

Question Presented.

The sole question presented is:

> Whether the contracts entered into on December 5th and 21st, 1947 were invalid under Section 5, 35 Stat. 66 (45 U. S. C. A., Section 55) for the reason that they enabled the defendant to escape a liability created by Section 6, 36 Stat. 291 (45 U. S. C. A., Sec. 56).

This question involves the determination of what Congress intended by the use of the words "Any Liability created by this Chapter," as used in Section 5.

III.

STATEMENT OF THE CASE.

On or about November 23, 1946, at about 7:30 P. M. petitioner was injured while pulling an operating lever on a railroad car, while employed by respondent as a yard brakeman, in its Nichols Yards at Battle Creek, Michigan. The knuckle lock disconnected, when Petitioner pulled the lever, causing Petitioner to lose his balance and fall to the ground (R. 18).

On or about December 5th, 1946, Petitioner while still disabled on account of his injuries, told Respondent that he was without funds for living expenses and requested an advance of funds from Respondent to be used for that purpose (R. 18).

Respondent, on that date, advanced to Petitioner the sum of Fifty dollars (R. 18) but required Petitioner, in consideration of such advancement, to sign one of the contracts here in question (R. 25-26).

On December 21, 1946; Petitioner made a similar request for funds for the same purpose and Respondent advanced to him the further sum of Fifty Dollars (R. 19). Petitioner was also required on that occasion to sign another contract, identical with the first (R. 19, 26-27).

The material portion of these identical contracts was (R. 25-26):

> 1. That I will endeavor in good faith to settle any claim I may have for my said injuries.
>
> 2. If my said claim cannot be settled to my satisfaction and should I wish to start suit against said Grand Trunk Western Railroad Company to recover damages for my said injuries, that any such suit shall be commenced within the county or district where I resided at the time my injuries were sustained or in

the county or district where my injuries were sustained and not elsewhere.

3. That all sums of money now or hereafter advanced to me by said Railroad Company shall be deducted from any sum which shall finally be paid to me by said Railroad Company, either in settlement or as a satisfaction of judgment, or otherwise, on account of said injuries.

Petitioner filed suit in the Superior Court of Cook County, Illinois, June 25th, 1947 (R. 19) under the Federal Employers' Liability Act (R. 5, 39; Appendix, page 31).

Respondent filed its complaint in Chancery in the Circuit Court of Calhoun County, Michigan, July 17th, 1947, praying that Petitioner be restrained from prosecuting his suit in Cook County, Illinois and for other relief (R. 23). It set up the contracts as the basis for the relief sought, supplemented by charges of inconvenience and expense (R. 17-24).

The trial court entered a temporary restraining order. Plaintiff moved to dissolve the temporary injunction on the grounds that the contracts were invalid under Section 5, 35 Stat. 66 (45 U. S. C. A., Sec. 55) and to dismiss the suit (R. 34). This motion was allowed (R. 37-47).

Respondent appealed to the Supreme Court of Michigan where the judgment of the trial court was reversed (June 29th, 1948 (R. 52-57). Petitioner's application for a rehearing was denied October 4th, 1948 (R. 92). That Court granted a stay of mandate pending petition for writ of certiorari to this Court (R. 97).

IV.

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Michigan erred:

1. In holding that the words "any liability created by this chapter" as used in Section 5, relates only to liability to respond in damages under Section 1, 35 Stat. 65 (45 U. S. C. A., Section 51) (R. 55).

2. In holding that Section 5 does not prohibit such contracts when made after the cause of action arises (R. 55).

3. In refusing to be bound by the decision of the United States Court of Appeals in *Akerly* v. *New York Central R. Co.*, 168 F. (2nd) 812, decided June 14th 1948 and prior to the Michigan Court's decision in the instant case (R. 68-75).

4. In holding that the contracts were valid under Section 5 and were legal and binding upon Petitioner (R. 56).

5. In reversing instead of affirming the judgment of the Circuit Court of Calhoun County, Michigan; entering a decree restoring the temporary injunction, as granted by the lower court and remanding the cause for further proceedings (R. 56).

V.

SUMMARY OF THE ARGUMENT.

A.

The primary purpose of Congress in enacting the Federal Employers Liability Act was not to create liability to respond in damages. Liability in that sense, already existed as a result of the common law right of action in which the railroad man could sue to recover for wrongful injuries. Congress merely took that common law right of action and pruned away what were considered to be its injustices.

In each successive amendment of the law down to and including the 1939 amendment, Congress has adhered to that dominant purpose of removing unjust rules and practices at the common law.

The words "any liability created by this chapter" is not the same as saying "any liability created by Section 1 of the Act". Congress, in the enactment of the law created a new liability and substituted it for the existing liability at the common law. That new liability is the composite of all of the separate provisions of the Act. If one element of that liability can be destroyed, all can be destroyed. The successive destruction by such a contract of the elements of that liability, would, like the successive pulling down of the pillars of a t mple, destroy the entire structure, erected by Congress and strengthened and perfected by amendments over the period of forty years that have elapsed since the law was passed.

One of the vital elements of that liability is the right of the railroad man to select the forum in which to bring his suit, as provided in Section 6. The comprehensive language of Section 5 outlaws any contract, the effect of which is to destroy the right to freely choose such a forum, and it is void under that provision.

B.

The Michigan Court erred in holding contrary to this Court's decision in *Duncan* v. *Thompson*, 315 U. S. 1, that contracts made after a cause of action accrues are valid.

C.

The Michigan Court erred in refusing to follow controlling decisions of the Federal Courts, holding that the venue provision of the Act is an inherent part of the employers liability.

D.

The court's holding that such contracts as the ones here involved, are supported by the better reasoning.

E.

The history of the legislation reveals that Congress used its powers under the Constitution to the fullest extent in the effort to protect the railroad man from the unjust rules and practices of the common law right of action, to place him upon an equal footing with his powerful employer and to remove preventable hazards from operative railroading.

The current injustice which received the most studied notice was that sought to be removed by Section 5. The Michigan lower Court correctly held that the contracts here were void under that provision. For reasons discussed in the brief, the Supreme Court of Michigan erred when it reversed that judgment.

VI.

ARGUMENT.

A

The liability created by the Federal Employers' Liability Act is the composite of all of its provisions and Section 5 protects every element of that liability.

The primary purpose of Congress in enacting the Federal Employers' Liability Act was not to create liability to respond in damages. Liability in that sense, already existed as a result of the common law right of action in which the railroad man could sue to recover for wrongful injuries. Congress merely took that common law right of action and pruned away what were considered to be its injustices.

Congressman Sterling, in charge of the original bill HR 20310 in the 60th Congress, in presenting it to the House described it, not in terms of liability, but in terms of the injustices removed (42 Cong. Rec. 4427):

> The first two sections of the bill abolish the doctrine of fellow servant in this line of commerce.
>
> • • •
>
> Section 3 is a modification of the common law doctrine of contributory negligence.
>
> • • •
>
> The provision in Sections 3 and 4 provides that contributory negligence and assumption of risk shall not be charged to the employee, where he is injured by reason of the violation of any statute by the employer that has been enacted for the safety of employees.
>
> (The 1939 amendment to the Act abolished every vestige of the assumption of risk doctrine in these

> cases where injuries were due in whole or in part to the negligence of any of the officers, agents, or employees of the carrier, 53 Stat. 1404, *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54.)
>
> • • •
>
> Section 5 of the bill provides that all contracts, rules and regulations which seek to exempt the employer, the common carrier, from (any) liability created by this act shall be void so far as it seeks to produce that exemption.

This primary purpose of Congress to shield injured railroad men and their families from these common law rules and practices that were deemed unjust, shaped, not only the original Act of 1908, but each succeeding amendment of that act.

The original act left the vital question of venue to be controlled by the general federal venue provisions which required suit under the act to be brought in the district of which the defendant was an inhabitant. The injustice of this requirement was removed by the 1910 amendment which added Sections 6 through 9 to the original act, 36 Stat. 291, 45 U. S. C. A., Sections 56-59.

For the reason that the good faith of Congress in passing the original Act in 1908 had been questioned by counsel for the railroads in the Mondou and Hoxie cases (223 U. S. 1 and 82 Conn. 352), the Senate Report, No. 422, accompanying the Amendment, proclaimed the purpose of the legislation as follows (45 Cong. Rec. 4041):

> This subject is referred to here only for the purpose of calling upon Congress to make entirely manifest the good faith of the legislature in the enactment of the employers' liability law, which places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling. The total casual-

ties to trainmen on the interstate railroads of the United States for the year 1908 was 281,645.

It was the intention of Congress in the enactment of this law originally and it may be presumed to be the intention of the present Congress, to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can, as the Supreme Court said in the Taylor Case (211 U. S. 281), "measurably control their causes".

The passage of the original act and the perfection thereof by the amendments herein proposed stand forth as a declaration of public policy to radically change, as far as congressional power can extend, those rules of the common law which the president, in a recent speech at Chicago, September 16, 1909, characterized as "unjust". President Taft in his address at Chicago September 16, 1909 referred to the continuance of unjust rules of law exempting employers from liability for accidents to laborers.

This public policy which we now declare is based upon the failure of the common-law rules as to liability for accident, to meet the modern industrial conditions and is based not alone upon the failure of those rules in the United States, but their failure in other countries as well.

• • •

The passage of the law was urged upon the strongest and highest considerations of justice and promotion of the public welfare. It was largely influenced by the strong message of President Roosevelt to the Sixtieth Congress in December, 1907, in which the basis of the legislation was clearly and strongly placed upon the ground of justice to the railroad workmen of this country and in which legislation was urged to the limit of congressional power upon this subject.

The 1939 amendment to the act, added Section 10, 53 Stat. 1404, 45 U. S. C. A., Section 60. That provision, on its face, so clearly exemplifies this declaration of policy and so clearly establishes it as a continuing policy down to this date, that it will bear quoting here:

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to pre-

vent employees of any common carrier from furnishing, voluntarily, information to a person in interest as to the facts incident to the injury or death of any employee shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, that nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

That Congress while concerned about injustices to the employee was not unmindful of justice to the carriers, appears from the *proviso* to this section. That fact also appears from the rejection by Congress in 1910 of a proposed venue provision which would have permitted suit in the district "in which the defendant shall be found at the time of commencing the action" (45 Cong. Rec. 2253). This was changed in the provision adopted, to suit in the district "in which the defendant shall be doing business at the time of commencing such action". 36 Stat. 291, 45 U. S. C. A., Section 56.

It is Petitioner's contention that "any liability created by this chapter" means just what it says and that the comprehensive language of Section 5 was deliberately chosen by Congress to preserve the status of the employee at the level fixed by the aggregate of the Act's provisions. The status given to him by the Act in its entirety, was designed to place him as nearly as possible on an equal footing with his powerful employer in the matter of claims

for injuries or death arising out of his employment, as a result of the employer's negligence, both in bargaining for settlement and in securing a judgment in court, where suit became necessary. It was intended by Congress that that position of equality should not be bartered away, either altogether or in piecemeal, by the employee in a moment of dire necessity, as Petitioner was induced to do in this case. The powerful employer must know that when it attempts to induce the necessitous employee to forego any of the privileges or immunities given to him in the Act, for some temporary advantage, such as Fifty Dollars or One Hundred Dollars or any amount of money, with which to purchase the necessities of life, while recovering from his injuries, it bargains with the employee, armored with every protecting provision of the Act.

The privilege of selecting a forum at any place where his employer is carrying on its business is one of those protecting provisions and comes within the meaning of the words "any liability created by this chapter."

In the light of the obvious and declared policy of Congress, this intention on the part of Congress is indisputably shown by the legislative history of Section 5.

When the original bill introduced in the House in [illegible] reached the Senate, a substitute bill was there introduced. Included in the substitute bill was a provision offered as a substitute for Section 5 of the House bill. The subsfitute was lifted from the first Employers' Liability Act, passed in 1906, and was identical with Section 3 of the 1906 Act. That Section, 34 Stat. 232, was as follows:

> That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit or indemnity by the person entitled thereto, shall constitute any bar

> or defense to any action brought to recover damages for personal injuries to or death of such employee.

If Congress merely desired to prohibit contracts enabling the carrier to exempt itself from liability to respond in damages, the foregoing provision would have been ample for that purpose. Its rejection as a substitute for Section 5 indicates that Congress wanted to protect the employee against contracts that would permit the employer to escape liability through pleading or practicing *any* of the defenses outlawed by the Act. The language of the provision adopted:

> *Any contract* * * * the purpose or intent of which shall be to enable *any carrier* to exempt itself from *any liability created by this chapter*, shall, to that extent, be void (Italics ours);

is comprehensive enough to protect every right or privilege given to the employee and to prevent the carrier from restoring to itself by contract any defense or practice formerly available to it, under the rules of the common law. The rejection of the old provision and the adoption of the new one, in the light of the background and history of the law and the enactment of the law itself would seem to lead inevitably to the conclusion that this was the intention of Congress. "Any liability created by this Chapter" is not the same as saying "any liability created by Section 1". Congress in the enactment of the law, created a new liability and substituted it for the existing liability at the common law. That new liability is the composite of all of the separate provisions of the Act. If one element of that liability can be destroyed, all can be destroyed. The successive destruction by such a contract of the elements of that liability, would, like the successive pulling down of the pillars of a temple, destroy the entire structure erected by Congress and strengthened and perfected by amendments

over the period of forty years that have elapsed since the law was passed.

This court in *Duncan* v. *Thompson*, 315 U. S. 1, 62 Sct. 422, appears to have come to that conclusion, when it said (Page 6):

> "Because the various state measures directed against contractual arrangements intended to exempt employers from liability were thus laid before Congress, the rejection of the restrictive language of Section 3 of the old act indicates a deliberate abandonment of the limitation of that section. And the adoption of Section 5 of the present act without adding any of the other limitations which some of the state statutes had embodied, argues persuasively that Congress wanted Section 5 to have *the full effect that its comprehensive phraseology implies.*" (Italics ours).

B.

Contracts made after the Cause of Action accrues are void under Section 5.

This Court held in *Duncan* v. *Thompson*, 315 U. S. 1, 5:

> Without more the change from "contract" to "any contract, rule, regulation or device whatsoever" would seem to be an enlargement ample to include agreements made after the event of injury.

The Court found "more" (Page 6) and held that Congress wanted Section 5 to have the full effect that its comprehensive phraseology implies.

The Supreme Court of Michigan disregarded this point in the Duncan case and said (R. 55):

> There are reasons why Congress should interest itself in prohibiting contracts requiring employees to waive such liability as a condition of employment, but there is no apparent reason why Congress would interest itself in prohibiting a fair and reasonable con-

> tract made without fraud after a cause of action has accrued.

The Michigan Court thus ruled on a federal right and erred in refusing to follow the federal rule announced by this court.

C.

The Michigan Court decided the main question Contrary to controlling Federal decisions.

The United States Court of Appeals, Sixth Circuit, in *Akerly* v. *New York Central Railroad Company*, 168 F (2nd) 812, decided prior to the decision in the instant case, held identical contracts to be invalid under Section 5. The Court, after citing the Duncan case, said (Page 815):

> We think the inclusion of this section in the Employers' Liability Act, with its creation of new obligations against the employer, makes the venue provision an inherent part of the employers liability. An attempt to limit it by contract is an attempt to exempt the railroad from liability and is void.

This case was decided June 14th, 1948 (R. 68). The Michigan Court decided the case at bar June 29th, 1948 (R. 57). The Akerly decision was called to the court's attention in the Application for Rehearing (R. 64, 68) filed July 17th, 1948 (R. 59).

The correct answer to the question before the court depended upon the construction of a federal statute. This court said in *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, 62 Set. 6, 10, that in such a case:

> Consequently the action of a state court must be in accord with the federal statute and the federal rule as to its application rather than state statute, rule or policy.

The Court thus refused to follow the decision of this Court in the Duncan case; that of the United States Court of Appeals in the *Akerly* case and numerous other Federal District Courts and State Courts. Instead it followed the line of cases that, for the most part, held to the theory that only contracts made before the accrual of the cause of action are void under Section 5 (R. 55).

The Court erred in its refusal to follow the federal rule and in failing to grant Petitioner's application for a rehearing when that rule as announced by the United States Court of Appeals for the Sixth Circuit, which embraces the State of Michigan was called to its attention.

D.

The Contracts are Invalid.

Other State and Federal Courts have held such contracts invalid:

In *Peterson* v. *Ogden Union Railway and Depot Co.*, 175 Pac. (2nd) 744, (1946) the Supreme Court of Utah in denying validity to the contract there involved, pointed out the comprehensive nature of Section 55 and the real purpose of Section 56.

After the accident, but before suit was brought, the Company advanced the injured employee $500.00 on account of his injuries and required him to sign an agreement that in case a final settlement could not be reached, he would not bring suit in any jurisdiction outside of the District Court of the United States, Northern Division, of Utah.

Suit was filed in a State Court. Before trial on the merits of the case, the trial court, on motion of the company, dismissed the action on the ground that the contract was bind-

ing on Peterson. He appealed and the Supreme Court in reversing the judgment of the trial court, said:

> "It is apparent that Congress by the use of the very broad terms of Section 5 intended to protect fully the rights given employees by the Chapter. The section says 'any' device whatsoever the purpose or intent of which shall be to enable the carrier to exempt itself from 'any' liability created by the chapter, shall to that extent be void. The Supreme Court of the United States in *Duncan* v. *Thompson*, Jan., 1942, 315 U. S. 1, 62 S. Ct. 422, 86 L. Ed. 565, held the section applied to contracts made after the cause of action arose as well as those made before. Regardless of the intention of the parties, if the practical effect of the contract or device is to exempt the carrier from any liability imposed by the chapter, the contract or device is void. *Philadelphia, B. & W. R. Co.* v. *Schubert*, 224 U. S. 603, 32 S. Ct. 589, 56 L. Ed. 911; *McAdow* v. *Kansas City Western R. Co.*, 100 Kan. 309, 164 P. 177, L. R. A., 1917 E., 539; *Larson* v. *Lewis-Simas-Jones Co.*, 29 Cal. App. 2d 83, 84, P. 2nd 296.
>
> * * *
>
> "Section 6 makes available to the plaintiff several courts in which he may bring the action. Clearly that section gives the employee substantial benefits. It was not only for his convenience and to enable him to choose a court where the expense of litigation would not be prohibitive, but it was to give him the right to select the courts in which he considers it would be most advantageous for him to bring his action.
>
> * * *
>
> "The defendant contends that the plaintiff exercised his right to choose the court in which to bring his action by entering into the contract, and, inasmuch as the plaintiff had the right to choose and exercised that right by choosing the federal court, Sections 5 and 6 of the Act are not contravened by the contract.
>
> "The spirit and the letter of the Act require that an injured employee be left free and uninfluenced by the carrier in selecting the court in which to bring his action. The liableness to a judicial pronouncement of liability in any of the courts enumerated in section 6 of

> the Federal Employers' Liability Act is, itself, a 'liability' as that word is used in Section 5 of the Act. Hence so much of the contract as attempts to limit the courts in which plaintiff may bring his suit is void under Section 5 and should not be enforced."

The Utah Supreme Court quotes extensively and with approval from *Sherman* v. *Pere Marquette Ry. Co.*, 62 F. Supp. 590 (1945), decided by Judge Barnes, in the United States District Court, Northern District of Illinois, Eastern Division, at Chicago.

In the Sherman case, the company advanced the injured employee, at his request, $200.00 per month for a period of nine months, a total of $1,800.00. At the time of receiving each payment, Sherman signed a contract similar to the contracts here, in which he agreed that he would sue only in the Circuit Court of Wayne County, Michigan, or in the Federal Court, at Detroit, Michigan.

Sherman filed suit in the Federal Court at Chicago and the Company moved to dismiss on the ground of improper venue, contending that proper venue was fixed by the agreement.

In addition, the Company set up facts similar to the allegations in the Complaint here tending to show how greatly it would be inconvenienced in getting its witnesses to Chicago and that it would be put to added expense in trying the case at Chicago.

In holding the agreements void, the Court said:

> "The comprehensive phraseology of Section 5 certainly includes within its meaning a contract the purpose or intent of which is to enable the common carrier to exempt itself from liability to suit for a violation of the act, 'in the district * * * in which the defendant shall be doing business at the time of commencing such action.' The beneficial effects of the statute should not be whittled away by the courts by distinguishing

between adjective and substantive rights and adjective and substantive duties or liabilities. Adjective rights and their correlative duties or liabilities are frequently as important as substantive rights, and substantive rights and their correlative duties or liabilities are of little value without adjective rights and their correlative duties or liabilities whereby the substantive rights may be enforced. It has been said that the word 'liability' in Section 5 is limited to the liability of the carrier to respond in damages, but when we say that we beg the real question, which is as to the meaning of the word 'liability' in Section 5. It is said that venue is a privilege that may be waived, and that the case of *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437, lends support to this view. Generally speaking, venue is a privilege which may be waived, but it may not be contracted away in the face of a specific statute which prohibits such contracting, as does Section 5 of the Employers' Liability Act under consideration."

"The court is of the opinion that the contracts in question in this suit are void because they are prohibited by Section 5 of the Federal Employers' Liability Act.

"The court's attention has been called to the decisions in *Clark* v. *Lowden*, D. C. 48 F. Supp. 261, *Herrington* v. *Thompson*, 61 F. Supp. 903, filed in the Western District of Missouri, *Detwiler* v. *Lowden*, 198 Minn. 185, 269 N. W. 367, 838, 107 A. L. R. 1054, and *Peterson* v. *N. Y. Central R. Co.*, a decision without opinion by one of the judges of this court. These four decisions do support the contentions of the defendant and are worthy of great respect, but this court finds itself unable to follow them.

See also *Fleming* v. *Husted*, 68 F. Supp. 900, and *Krenger* v. *Penn R. Co.*, 8 F. R. D. 65.

We shall not at this time discuss other cases in which the contracts have been held valid. These cases are cited in the Petition (Page 7) and are cited by the Michigan court in its opinion (R. 55).

The Court erred in holding that the contracts here are valid and legal and binding upon petitioner.

E.

The judgment of the lower State Court was correct and should be affirmed.

In passing the Federal Employers' Liability Act in 1908 and in strengthening it in 1910 by enacting the venue and jurisdictional provision in its present form, Congress intended to exercise its power under the commerce clause of the Constitution to its fullest extent.

The then current injustice which received the most studied notice in the report of the Committee in charge of the original bill was the one with which we are here concerned, the practice of the carriers to exempt themselves by contract or other device from liability in personal injury cases, whether the injuries resulted from the employer's negligence or from any other cause. This was removed by the broad language of Section 5.

The reason for this broad and complete exercise of power, and its purpose, are evident from the history of the legislature. Congress intended, insofar as it was possible, to remove preventable hazards from operative railroading, to abolish the injustices that were falling so heavily upon the railroad workers and to place the injured railroad man and his next-of-kin on an equal footing with his employer, in bargaining for settlements and in Court, if suit was brought. If Congress fell short of that purpose it could not have been from lack of power or from lack of intention to use all of the power it had. The trial court, therefore, reached the correct result.

For the reasons above given, the Supreme Court of Michigan erred in reversing instead of affirming the judgment

of the Circuit Court of Calhoun County, Michigan; in entering a decree restoring the temporary injunction as granted by the lower court and in remanding the cause for further proceedings.

Conclusion.

Petitioner therefore urges that the writ prayed for in the petition be issued; that the decision of the Supreme Court of Michigan be reviewed by this Court and its judgment reversed and remanded with such directions as to the Court may seem just and proper.

Respectfully submitted,

MELVIN L. GRIFFITH,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
FRANCIS H. MONEK,
Chicago, Illinois.

JOHN L. MECHEM,
Battle Creek, Michigan,
Of Counsel.

APPENDIX

IN THE

SUPERIOR COURT OF COOK COUNTY, ILLINOIS.

Alexander Boyd, *Plaintiff*, vs. Grand Trunk Western Railroad Company, a corporation, *Defendant.*	No. 47 S 10416 Jury trial is demanded.

Complaint at Law.

The plaintiff, Alexander Boyd, by Edward B. Henslee, his attorney, says:

1. Defendant is a corporation organized and existing under and by virtue of the laws of the State of Michigan and under its charter is empowered to and does operate a system of railroad running through the States of Michigan and Illinois, as a common carrier by railroad of passengers and freight for hire, with one of its lines running into Chicago, Cook County, Illinois, where it maintains an office in charge of officers and agents upon whom service of progress may be had.

2. At the time of the accident and injury hereinafter complained of the plaintiff was a yard brakeman employed by the defendant in its Nichols Yard at or near Battle Creek, Michigan, and in his line of duty engaged in the switching of cars with interstate shipments therein, and by reason thereof plaintiff and defendant were engaged in interstate commerce and transportation and plaintiff's action herein arises under the Act of Congress of April 22, 1908,

35 Stat. 65, Chap. 149, with amendments thereto, commonly known as the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51-59, and the Federal Safety Appliance and Equipment Act, 45 U. S. C. A., Sections 1-16, being an Act of Congress of March 2, 1893, Chapter 196, 27 Stat. 531, with amendments thereto to the present time.

3. At the time of, before and after the acts of negligence hereinafter set forth, the plaintiff was in the exercise of all due care and caution for his own safety.

4. On or about November 23, 1946, at approximately 7:30 P. M. the plaintiff was a yard brakeman and a member of a crew engaged in the making up and breaking up of trains and the switching of cars for the defendant at its Nichols Yard at or near Battle Creek, Michigan, and it became and was his duty in the interest of and in furtherance of the defendant's business to disconnect one car from a cut of about thirteen cars, and it then and there became and was the duty of the defendant to maintain its cars and equipment thereon and also to operate, control and manage its locomotive and cars so as not to injure the plaintiff rightfully along its lines of railroad.

5. The defendant disregarded its duty toward the plaintiff at the time and place set forth, in one or more of the following ways:

a) Defendant was careless and negligent in that it hauled or used along its lines a car which would not uncouple automatically, contrary to and in violation of the laws of the United States as set forth in 45 U. S. C. A., Chapter 1, Section 2 thereof.

b) Defendant was careless and negligent in the control, management and operation of its locomotive and cars.

c) Defendant was careless and negligent in not giving the plaintiff time to get onto the stirrup on one of its cars in order to disconnect another, contrary to and in violation of the usual method of doing this work.

d) Defendant was careless and negligent in not using ordinary care to furnish the plaintiff with a reasonably safe place in which to do his work in that it allowed one of its ties to protrude above the ballast a distance of four to five inches at a much used and well traveled place on its premises.

e) Defendant was careless and negligent in not using ordinary care to reasonably light its premises so that its men in their line of duty could see the hazardous condition of the premises and protect themselves against stumbling over protruding ties at a much used and well traveled place along its lines of railroad.

6. As a direct and proximate result of one or more of the foregoing acts of negligence the plaintiff had to hurry to catch some cars which were being kicked and did not have time to get onto the stirrup of the car and when he tried the cutting lever to disconnect the car he found it to be disconnected and the unexpected giving of the cutting lever caused him to strike a protruding tie and threw him with great force and violence to and upon the ground and divers objects thereon, and by reason thereof he was caused to be so injured that divers bones of his body and back were dislocated, broken and compressed; divers membranes, muscles, ligaments, nerves and blood vessels of his body were sprained, torn, cut, bruised and injured; divers other organs of his body were displaced, bruised, torn, injured and their functions impaired; his brain and nervous system were greatly shocked, injured, and their functions impaired; he became sick, sore, lame and disabled from thence hitherto; he suffered great pain and anguish by reason of his said injuries, and will in the future continue to suffer therefrom; and by reason of his said injuries he expended and incurred great liability and indebtedness endeavoring to be cured of his injuries, and will in the future expend and incur considerable sums of money endeavoring to be cured of his injuries, and the plaintiff has and

will be unable to attend to his customary affairs and business, and he has and will be disabled for an indefinite time in the future, the exact time being unknown to the plaintiff at the present time.

To the damage of the plaintiff in the sum of One Hundred Thousand Dollars ($100,000.00) and therefor he brings this suit.

EDWARD B. HENSLEE,
Attorney for Plaintiff.

STATE OF ILLINOIS,
COUNTY OF COOK. } ss

I, HENRY SONNENSCHEIN Clerk of the Superior Court of Cook County, in and for the State of Illinois, and the keeper of the records, files and seals thereof, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain complaint Filed in my office on the 25th day of June, A. D. 1947 a certain cause now pending in said Court on the law side thereof, wherein Alexander Boyd, Plaintiff, and Grand Trunk Western Railroad Co., a corp., defendant.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at Chicago, this 20th day of December, A. D. 1948.

(SEAL) Henry Sonnenschein, Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. ~~1948.~~ 1948

No. ~~486~~ 17

ALEXANDER BOYD,
Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT.

REPLY BRIEF ON BEHALF OF PETITIONER.

MELVIN L. GRIFFITH,
Chicago, Illinois,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
FRANCIS H. MONEK,
Chicago, Illinois.

JOHN L. MECHEM,
Battle Creek, Michigan,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 486

ALEXANDER BOYD,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT.

REPLY BRIEF ON BEHALF OF PETITIONER.

I.

THE QUESTION HERE RESTS UPON EXISTING FACTS AND EXISTING RIGHTS AND IS NOT MOOT.

The question to be decided by this Court involves the freedom of an injured railroadman to select the forum in which to bring his suit and to have the issues tried in that forum. As was said in *Peterson* v. *Ogden Union Railway and Depot Co.*, 175 Pac. (2d) 744, cited in our brief in support of the Petition for Certiorari, p. 251.26:

> "The spirit and the letter of the Act require that an injured employee be left free and uninfluenced by

the carrier in selecting the Court in which to bring his action."

Plaintiff selected the Superior Court of Cook County in which to bring his suit. That suit is still pending. The right to select that forum and to have his case heard there still exists. The controversy growing out of the contracts in which respondent claims he parted with this right, still exists.

The Supreme Court of Michigan decided that controversy against Petitioner. The controversy is now in this Court for the purpose of determining the validity or invalidity of the contracts which are said to limit his freedom of choice of a forum in which to bring his suit. If they are invalid he still has that freedom of choice. If they are valid he is required to choose his forum from the field as limited by those contracts.

As a precaution against the possibility that he may be required by a final decision of this Court to bring his suit in a forum prescribed by the contracts, he filed another suit in the United States District Court sitting at Detroit, Michigan. Two years of the three year period of limitation provided by the venue section of the statute were gone. To protect his right to file suit anywhere in the event this Court should affirm the judgment of the Supreme Court of Michigan and further, in that event, to get his case heard with as little additional delay as possible, he filed this second suit. (See Affidavit, Appendix.)

This second suit was filed at a place where he could have filed it in the first instance under the Act, apart from any requirement of the contract, had he deemed it to his advantage to do so. The fact that he selected the Cook County, Illinois forum in the first instance, in the circumstances of this case, constitutes a strong indication that the second forum was not freely chosen. That selection was compelled

by the fear that the contracts might finally be held valid by this Court. His freedom of choice was, therefore, still affected by the contracts even though this Court may hold they are invalid.

The assertion of Respondent that the second suit was filed in compliance with the contracts and in obedience to the injunctional order are mere conclusions of Respondent's counsel and are not based upon any fact in the record.

The suit in Chicago which furnished the reason for the controversy was freely brought in spite of the contracts and has not been dismissed. The facts upon which this Court is petitioned to act are not changed, so the question presented to this Court on those facts involve the merits of plaintiff's claim to the rights created by the Act.

Moreover, other questions remain for decision. The serious divergence of opinion of Federal and State Courts is to be corrected; the controlling quality of decisions of Federal Courts of review in Employers Liability Act cases is to be vindicated and the fact, as held in *Akerly* v. *New York Central Railroad Company*, 168 F. (2d) 812, 815, that though we deal here with private rights those rights are "affected with a public interest" is to be considered.

> *Cramer* v. *Phoenix Mutual Life Ins. Co. of Hartford, Conn.*, 91 F. (2d) 141, 144.

The question is therefore not moot and the case may not be dismissed.

II.

THERE IS A FEDERAL QUESTION.

Respondent admits that this Court has jurisdiction to hear this case, but denies there is any Federal question to be decided.

We rely upon what we say in the Petition and Supporting Brief on these subjects.

Respectfully submitted,

MELVIN L. GRIFFITH,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
FRANCIS H. MONEK,
Chicago, Illinois,

JOHN L. MECHEM,
Battle Creek, Michigan,
Of Counsel.

APPENDIX.

STATE OF ILLINOIS,
COUNTY OF COOK. } ss

MELVIN L. GRIFFITH, being first duly sworn, on oath says:

1. He is one of the attorneys for Petitioner in the above cause and represents Petitioner in the proceedings in this Court.

2. The case of *Alexander Boyd* v. *Grand Trunk Western Railroad Company*, a corporation, in the Superior Court of Cook County, Illinois, No. 47S10416 is still pending and will proceed to trial in said Court in the event that the judgment of the Michigan Court is reversed by this Court. (See clerk's certificate to complaint, Appendix, Page 34, Petition for Certiorari in this Court).

3. The case of *Alexander Boyd* v. *Grand Trunk Western Railroad Company*, a corporation, in the United States District Court, Eastern District of Michigan, Southern Division, No. 7718, was filed as a precaution to protect Petitioner's cause of action against the running of the Statute of Limitations in the event that this Court should affirm the judgment of the Michigan Court. The suit was filed on October 27, 1948, instead of delaying the filing of such a protective suit until this Court could pass upon the question, for the reason that in the event this Court should affirm the judgment of the Michigan Supreme Court, the case would be in a favorable position on the District Court's Calendar to be reached for an early trial, whereas if the filing of such protective suit were delayed until some later date, nearer to the time when the Statute would run, trial of the case would be greatly delayed.

4. When affiant served copies of the Record, Petition and Supporting Brief, together with Notice of filing the same in this Court, upon George F. Gronewold, Counsel for

Respondent in this cause, on or about the 3rd day of January, 1949, affiant informed Mr. Gronewold that the suit in the United States District Court, Eastern District of Michigan, had been or would be filed for the reasons stated in Paragraph 3.

5. Affiant further says that the sole reason for filing suit in Michigan was for the purpose above stated; that the suit was not filed in compliance with the contracts involved in these proceedings or with the restraining order of the Michigan Court; that the rights asserted here by Petitioner to file and maintain his suit in the Superior Court of Cook County and for which he seeks vindication in this Court, have not in any way been settled, compromised, surrendered or impaired, unless it is, that the diligence of his counsel in protecting his cause of action pending this Court's decision in the case be held to have that effect.

Further affiant sayeth not.

MELVIN L. GRIFFITH.

Subscribed and sworn to before me this 28th day of January, A. D. 1949.

[SEAL]

MARTIN J. KENNELLY,
Notary Public.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 17

ALEXANDER BOYD,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Respondents.

BRIEF ON BEHALF OF PETITIONER.

MELVIN L. GRIFFITH,
Chicago, Illinois,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
FRANCIS H. MONEK,
Chicago, Illinois,

JOHN L. MECHEM,
Battle Creek, Michigan,
Of Counsel.

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IN THE

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OCTOBER TERM, A. D. 1949.

No. 17

ALEXANDER BOYD,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Respondents.

BRIEF ON BEHALF OF PETITIONER.

STATEMENT.

Respondent contends in its brief in opposition to the petition that this cause has become moot. Its contention is based upon the fact that a second suit was filed subsequent to the decision by the Supreme Court of Michigan in a Federal Court at Detroit, Michigan.

Petitioner's reply filed in this court, we believe fully answers respondent's contention in this respect.

It is of course true that this court or any other court will not pass upon moot questions. But a cause or a question does not become moot so long as the primary issues remain unsettled. In the case at bar the primary object of the

controversy and the primary issues involved have all of their original vitality. This is so obvious that we shall omit any further reference to the matter.

I.

OPINION BELOW.

Grand Trunk Western R. Co. v. *Boyd*, 321 Mich. 693, 33 N. W. (2d) 120. (R. 52)

II.

JURISDICTIONAL GROUNDS.

The jurisdiction of this Court is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Section 1257.

The Supreme Court of Michigan has rendered a final judgment interpreting Section 5 of The Federal Employers' Liability Act, 35 Stat. 66 (45 U. S. C. A., Section 55) in a manner probably not in accord with this Court's decision in *Duncan* v. *Thompson*, 315 U. S. 1 and contrary to a decision of the United States Court of Appeals, Sixth Circuit in *Akerly* v. *New York Central R. Co.*, 168 F. (2d) 812.

There is a great divergence of judicial opinion[1] as to

[1] The cases in which courts have held such contracts as those here involved, invalid, are:

Sherman v. *Pere Marquette R. Co.*, 62 F. Supp. 590 (1945).
Peterson v. *Ogden Union Ry. & Depot Co.*, 175 Pac. (2d) 744 (1946).
Fleming v. *Husted*, 68 F. Supp. 900 (1946).
Porter v. *Fleming*, 74 F. Supp. 378 (1947).
Krenger v. *Penn. R. Co.*, 8 F. R. D. 65 (1947).
Akerly v. *New York Central R. Co.*, 168 F. (2d) 812 (1948).

The *Krenger* case was affirmed in *Krenger* v. *Pennsylvania R. Co.*, 174 F. (2d) 556 (1949).

the interpretation of Section 5 on the question here presented, and it is of fundamental importance in the administration of the Federal Employers' Liability Act that this Court exercise its supervisory power to resolve the question and finally determine the full scope of the words "Any Liability created by this chapter," as used in that provision. *Duncan* v. *Thompson*, 315 U. S. 1, 5, 62 Sct. 422, 423.

Statutes Involved.

1.

28 United States Code, Section 1257:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (3) By writ of certiorari, • • • where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

The courts in these cases rely, in the main, on *Duncan* v. *Thompson*, 315 U. S. 1 (1942).

This court, in the *Duncan* case held that the words "any contract" in Section 5 included contracts made after the cause of action arose as well as those made before. The courts holding such contracts valid have, in the main, overlooked this point in the case.

This court held that the contract in the *Duncan* case was invalid. For the reason that the effect of the contract there involved was to deprive the injured man of the right to sue at all until he had repaid the amount advanced to him, the courts holding the contracts valid, have sought to distinguish the *Duncan* case from the cases involving contracts to sue only in particular courts or at particular places.

The cases in which such courts have held such contracts valid are:

Detwiler v. *Chicago R. I. & P. R. Co.*, 15 F. Supp. 541 (1936).
Detwiler v. *Lowden*, 198 Minn. 185 (1936).
Clark v. *Lowden*, 48 F. Supp. 261 (1942).
Herrington v. *Thompson*, 61 F. Supp. 903 (1945).
Roland v. *A. T. & S. F. Ry. Co.*, 65 F. Supp. 630 (1946).
Akerly v. *N. Y. C. R. Co.*, 73 F. Supp. 903 (1947).

The *Akerly* case was reversed in *Akerly* v. *N. Y. C. R. Co.*, 168 F. (2d) 812 (1948).

2.

Section 5, 35 Stat. 66 (45 U. S. C. A., Section 55):

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void:
> • • •

3.

Section 6, 36 Stat. 291 (45 U. S. C. A., Section 56):

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. Apr. 22, 1908, c. 149, 6, 35 Stat. 66; Apr. 5, 1910, c. 143, 1, 36 Stat. 291; Mar. 3, 1911, c. 231, 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, 2, 52 Stat. 1404.

III.

Question Presented.

The sole question presented is:

> Whether the contracts entered into on December 5th and 21st, 1947 were invalid under Section 5, 35 Stat. 66 (45 U. S. C. A., Section 55) for the reason that they enabled the defendant to escape a liability created by Section 6, 36 Stat. 291 (45 U. S. C. A., Sec. 56).

This question involves the determination of the meaning and scope of the words "Any Liability created by this Chapter," as used by Congress in Section 5.

IV.

STATEMENT OF THE CASE.

On or about November 23, 1946, at about 7:30 P. M. petitioner was injured while pulling an operating lever on a railroad car, while employed by respondent as a yard brakeman, in its Nichols Yards at Battle Creek, Michigan. The knuckle lock disconnected, when Petitioner pulled the lever, causing Petitioner to lose his balance and fall to the ground (R. 18).

On or about December 5th, 1946, Petitioner while still disabled on account of his injuries, told Respondent that he was without funds for living expenses and requested an advance of funds from Respondent to be used for that purpose (R. 18).

Respondent, on that date, advanced to Petitioner the sum of Fifty dollars (R. 18) but required Petitioner, in consideration of such advancement, to sign one of the contracts here in question (R. 25-26).

On December 21, 1946, Petitioner made a similar request for funds for the same purpose and Respondent advanced to him the further sum of Fifty Dollars (R. 19). Petitioner was also required on that occasion to sign another contract, identical with the first (R. 19, 26-27).

The material portion of these identical contracts, was (R. 25-26).

> 1. That I will endeavor in good faith to settle any claim I may have for my said injuries.
>
> 2. If my said claim cannot be settled to my satisfaction and should I wish to start suit against said Grand Trunk Western Railroad Company to recover damages for my said injuries, that any such suit shall be commenced within the county or district where I resided at the time my injuries were sustained or in

the county or district where my injuries were sustained and not elsewhere.

3. That all sums of money now or hereafter advanced to me by said Railroad Company shall be deducted from any sum which shall finally be paid to me by said Railroad Company, either in settlement or as a satisfaction of judgment, or otherwise, on account of said injuries.

Petitioner filed suit in the Superior Court of Cook County, Illinois, June 25th, 1947 (R. 19) under the Federal Employers' Liability Act, Sections 51-60 and the Federal Safety Appliance Acts, Sections 1-16, (R. 5, 39; Appendix, page 27).

Respondent filed its complaint in Chancery in the Circuit Court of Calhoun County, Michigan, July 17th, 1947, praying that Petitioner be restrained from prosecuting his suit in Cook County, Illinois and for other relief (R. 23). It set up the contracts as the basis for the relief sought, supplemented by charges of inconvenience and expense (R. 17-24).

The trial court entered a temporary restraining order. Plaintiff moved to dissolve the temporary injunction on the grounds that the contracts were invalid under Section 5, 35 Stat. 66 (45 U. S. C. A., Sec. 55) and to dismiss the suit (R. 34). This motion was allowed (R. 37-47).

Respondent appealed to the Supreme Court of Michigan where the judgment of the trial court was reversed (June 29th, 1948 (R. 52-57). Petitioner's application for a rehearing was denied October 4th, 1948 (R. 92). That Court granted a stay of mandate pending petition for writ of certiorari to be filed in this Court (R. 97).

V.

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Michigan erred:

1. In holding that the words "any liability created by this chapter" as used in Section 5, relates only to liability to respond in damages under Section 1, 35 Stat. 65 (45 U. S. C. A., Section 51) (R. 55).

2. In holding that Section 5 does not prohibit such contracts when made after the cause of action arises (R. 55).

3. In refusing to be bound by the decision of the United States Court of Appeals in *Akerly* v. *New York Central R. Co.*, 168 F. (2d) 812, decided June 14th 1948 and prior to the Michigan Court's decision in the instant case (R. 68-75).

4. In holding that the contracts were valid under Section 5 and were legal and binding upon Petitioner (R. 56).

5. In reversing instead of affirming the judgment of the Circuit Court of Calhoun County, Michigan; entering a decree restoring the temporary injunction, as granted by the lower court and remanding the cause for further proceedings (R. 56).

VI.

SUMMARY OF THE ARGUMENT.

A.

The primary purpose of Congress in enacting the Federal Employers' Liability Act was not to create liability to respond in damages. Liability in that sense, already existed as a result of the common law right of action in which the railroad man could sue to recover for wrongful injuries. Congress merely took that common law right of action and pruned away what were considered to be its injustices.

In each successive amendment of the law down to and including the 1939 amendment, Congress has adhered to that dominant purpose of removing unjust rules and practices at the common law.

The words "any liability created by this chapter" is not the same as saying "any liability created by Section 1 of the Act". Congress, in the enactment of the law created a new liability and substituted it for the existing liability at the common law. That new liability is the composite of all of the separate provisions of the Act. If one element of that liability can be destroyed, all can be destroyed. The successive destruction by such a contract of the elements of that liability, would, like the successive pulling down of the pillars of a temple, destroy the entire structure, erected by Congress and strengthened and perfected by amendments over the period of forty years that have elapsed since the law was passed.

One of the vital elements of that liability is the right of the railroad man to select the forum in which to bring his suit, as provided in Section 6. The comprehensive language of Section 5 outlaws any contract, the effect of which is to destroy the right to freely choose such a forum, and it is void under that provision.

The contracts here fall within the prohibition of Section 5.

B.

The Michigan Court erred in holding contrary to this Court's decision in *Duncan* v. *Thompson*, 315 U. S. 1, that contracts made after a cause of action accrues are valid.

C.

The Michigan Court erred in refusing to follow controlling decisions of the Federal Courts, holding that the venue provision of the Act is an inherent part of the employers liability.

D.

The court's holding that such contracts as the ones here involved, are supported by the better reasoning.

E.

The history of the legislation reveals that Congress used its powers under the Constitution to the fullest extent in the effort to protect the railroad man from the unjust rules and practices of the common law right of action, to place him upon an equal footing with his powerful employer and to remove preventable hazards from operative railroading.

The current injustice which received the most studied notice was that sought to be removed by Section 5. The Michigan lower Court correctly held that the contracts here were void under that provision. For reasons discussed in the brief, the Supreme Court of Michigan erred when it reversed that judgment.

VII.

ARGUMENT.

A.

The liability created by the Federal Employers' Liability Act is the composite of all of its provisions and Section 5 protects every element of that liability.

It was not the primary purpose of Congress in enacting the Federal Employers' Liability Act to create liability to respond in damages. Liability in that sense, already existed as a result of the common law right of action in which the railroad man could sue to recover for wrongful injuries. Congress merely took that common law right of action and pruned away what were considered to be its injustices.

Congressman Sterling, in charge of the original bill HR 20310 in the 60th Congress, in presenting it to the House described it, not in terms of liability, but in terms of the injustices removed (42 Cong. Rec. 4427):

> The first two sections of the bill abolish the doctrine of fellow servant in this line of commerce.
>
> • • •
>
> Section 3 is a modification of the common law doctrine of contributory negligence.
>
> • • •
>
> The provision in Sections 3 and 4 provides that contributory negligence and assumpiton of risk shall not be charged to the employee, where he is injured by reason of the violation of any statute by the employer that has been enacted for the safety of employees.[2]
>
> • • •

[2] The 1939 amendment to the Act abolished every vestige of the assumption of risk doctrine in these cases where injuries were due in whole or in part to the negligence of any of the officers, agents, or employees of the carrier, 53 Stat. 1404, *Tiller v. Atlantic Coast Line*, 318 U. S. 54.

> Section 5 of the bill provides that all contracts, rules and regulations which seek to exempt the employer, the common carrier, from (any) liability created by this act shall be void so far as it seeks to produce that exemption.

This primary purpose of Congress to shield injured railroad men and their families from these common law rules and practices that were deemed unjust, shaped, not only the original Act of 1908, but each succeeding amendment of that act.

The original act left the vital question of venue to be controlled by the general federal venue provisions which required suit under the act to be brought in the district of which the defendant was an inhabitant. The injustice of this requirement was removed by the 1910 amendment which added Sections 6 through 9 to the original act[3].

For the reason that the good faith of Congress in passing the original Act in 1908 had been questioned by counsel for the railroads in the Mondou and Hoxie cases (223 U. S. 1 and 82 Conn. 352), the Senate Report, No. 422, accompanying the Amendment, proclaimed the purpose of the legislation as follows (45 Cong. Rec. 4041):

> This subject is referred to here only for the purpose of calling upon Congress to make entirely manifest the good faith of the legislature in the enactment of the employers' liability law, which places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling. The total casualties to trainmen on the interstate railroads of the United States for the year 1908 was 281,645.
>
> It was the intention of Congress in the enactment of this law originally and it may be presumed to be the

[3] 36 Stat. 291, 45 U. S. C. A., Sections 56-59.

intention of the present Congress, to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can, as the Supreme Court said in the Taylor Case (210 U. S. 281), "measurably control their causes".

The passage of the original act and the perfection thereof by the amendments herein proposed stand forth as a declaration of public policy to radically change, as far as congressional power can extend, those rules of the common law which the president, in a recent speech at Chicago, September 16, 1909, characterized as "unjust". President Taft in his address at Chicago September 16, 1909 referred to the continuance of unjust rules of law exempting employers from liability for accidents to laborers.

This public policy which we now declare is based upon the failure of the common-law rules as to liability for accident, to meet the modern industrial conditions and is based not alone upon the failure of those rules in the United States, but their failure in other countries as well.

• • •

The passage of the law was urged upon the strongest and highest considerations of justice and promotion of the public welfare. It was largely influenced by the strong message of President Roosevelt to the Sixtieth Congress in December, 1907, in which the basis of the legislation was clearly and strongly placed upon the ground of justice to the railroad workmen of this country and in which legislation was urged to the limit of congressional power upon this subject.

The 1939 amendment to the act, added Section 10, 53 Stat. 1404, 45 U. S. C. A., Section 60. That provision, on its face, so clearly exemplifies this declaration of policy and so clearly establishes it as a continuing policy down to this date, that it will bear quoting here:

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing, voluntarily, information to a person in interest as to the facts incident to the injury or death of any

> employee shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, that nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

That Congress while concerned about injustices to the employee was not unmindful of justice to the carriers, appears from the *proviso* to this section. That fact also appears from the rejection by Congress in 1910 of a proposed venue provision which would have permitted suit in the district "in which the defendant shall be found at the time of commencing the action" (45 Cong. Rec. 2253). This was changed in the provision adopted, to suit in the district "in which the defendant shall be doing business at the time of commencing such action". 36 Stat. 291, 45 U. S. C. A., Section 56.

It must be noted, also, that by the *proviso* in Section 10, certain contracts were excepted from its all inclusive coverage and that Section 5 contains no such exception.

It is Petitioner's contention that "any liability created by this chapter" means just what it says and that the comprehensive language of Section 5 was deliberately chosen by Congress to preserve the status of the employee at the level fixed by the aggregate of the Act's provisions. The status given to him by the Act in its entirety, was designed to place him as nearly as possible on an equal footing with his powerful employer in the matter of claims

for injuries or death arising out of his employment, as a result of the employer's negligence, both in bargaining for settlement and in securing a judgment in court, where suit became necessary. It was intended by Congress that that position of equality should not be bartered away, either altogether or in piecemeal, by the employee in a moment of dire necessity, as Petitioner was induced to do in this case. The powerful employer must know that when it attempts to induce the necessitous employee to forego any of the privileges or immunities given to him in the Act, for some temporary advantage, such as Fifty Dollars or One Hundred Dollars or any amount of money, with which to purchase the necessities of life, while recovering from his injuries, it bargains with the employee, armored with every protecting provision of the Act.

The privilege of selecting a forum at any place where his employer is carrying on its business is one of those protecting provisions and comes within the meaning of the words "any liability created by this chapter."

In the light of the obvious and declared policy of Congress, this intention on the part of Congress is indisputably shown by the legislative history of Section 5.

When the original bill introduced in the House in 1908 reached the Senate, a substitute bill was there introduced. Included in the substitute bill was a provision offered as a substitute for Section 5 of the House bill. The substitute was lifted from the first Employers' Liability Act, passed in 1906, and was identical with Section 3 of the 1906 Act. That Section, 34 Stat. 232, was as follows:

> That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit or indemnity by the person entitled thereto, shall constitute any bar

> or defense to any action brought to recover damages for personal injuries to or death of such employee.

If Congress merely desired to prohibit contracts enabling the carrier to exempt itself from liability to respond in damages, the foregoing provision would have been ample for that purpose. Its rejection as a substitute for Section 5 indicates that Congress wanted to protect the employee against contracts that would permit the employer to escape liability through pleading or practicing *any* of the defenses outlawed by the Act. The language of the provision adopted:

> *Any contract* • • • the purpose or intent of which shall be to enable *any carrier* to exempt itself from *any liability created by this chapter*, shall, to that extent, be void (Italics ours);

is comprehensive enough to protect every right or privilege given to the employee and to prevent the carrier from restoring to itself by contract any defense or practice formerly available to it, under the rules of the common law. The rejection of the old provision and the adoption of the new one, in the light of the background and history of the law and the enactment of the law itself would seem to lead inevitably to the conclusion that this was the intention of Congress. "Any liability created by this Chapter" is not the same as saying "any liability created by Section 1". Congress in the enactment of the law, created a new liability and substituted it for the existing liability at the common law. That new liability is the composite of all of the separate provisions of the Act. If one element of that liability can be destroyed, all can be destroyed. The successive destruction by such a contract of the elements of that liability, would, like the successive pulling down of the pillars of a temple, destroy the entire structure erected by Congress and strengthened and perfected by amendments

over the period of forty years that have elapsed since the law was passed.

This court in *Duncan* v. *Thompson*, 315 U. S. 1, 62 Sct. 422, appears to have come to that conclusion, when it said (Page 6):

> "Because the various state measures directed against contractual arrangements intended to exempt employers from liability were thus laid before Congress, the rejection of the restrictive language of Section 3 of the old act indicates a deliberate abandonment of the limitation of that section. And the adoption of Section 5 of the present act without adding any of the other limitations which some of the state statutes had embodied, argues persuasively that Congress wanted Section 5 to have *the full effect that its comprehensive phraseology implies.*" (Italics ours).)

Section 10 with its *proviso* excepting certain contracts from the same comprehensive language, "Any contract, rule, regulation or device whatsoever," as used in Section 5, argues just as persuasively, that "Any liability created by this chapter" may not be hedged about by exceptions not found in the Act itself.

The full effect of the comprehensive phraseology of the section cannot be determined by lifting the single word "liability" from its context and going either to the legist or to the lexicographer for its meaning.

In the first place the word taken alone may have a score of meanings, depending upon the setting and the circumstances in which it is used.[4] As Mr. Justice Holmes said:[5]

> "A word is not a crystal transparent and unchanged. It is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

[4] 53 C. J. S. Liability, page 16.
[5] *Towne* v. *Eisner*, 245 U. S. 418, 425.

In the second place the "circumstances" and the "time" and the "setting" in which the word is used in Section 5, leave no room for going afield in any attempt to define the word itself. "*Any liability created by this chapter,*" directs the attention to the Act itself; to its phraseology, to the reasons for its enactment and to the purposes it was designed to achieve, not for a definition of the word itself, but for the meaning of the phrase of which it is a part. These sources furnish its color and content, even though, when its obvious meaning is determined, it might be said that Congress might have used another word which would have more certainly expressed its intention. Yet it is difficult, indeed, impossible, in view of the importance of the many safeguards with which Congress sought to protect the employees right of action against *injustices*, to find a better word. Certainly "provisions" instead of "liability" as indicated by the Michigan Supreme Court (R. 39) would not have been apt, for some of the later provisions do not pretend to fix any new duty or obligation or responsibility or burden upon the carrier—Sections 7 and 8 for illustrations.[6]

B.

Contracts made after the Cause of Action accrues are void under Section 5.

This Court held in *Duncan* v. *Thompson*, 315 U. S. 1, 5, said:

> Without more the change from "contract" to "any contract, rule, regulation or device whatsoever" would seem to be an enlargement ample to include agreements made after the event of injury.

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[6] 36 Stat. 291, 45 U. S. C. A. Sections 57, 58.

The Court found "more" (Page 6) and held that Congress wanted Section 5 to have the full effect that its comprehensive phraseology implies.

The Supreme Court of Michigan disregarded this point in the Duncan case and said (R. 55):

> There are reasons why Congress should interest itself in prohibiting contracts requiring employees to waive such liability as a condition of employment, but there is no apparent reason why Congress would interest itself in prohibiting a fair and reasonable contract made without fraud after a cause of action has accrued.

The Michigan Court thus ruled on a federal right and erred in refusing to follow the federal rule announced by this court.

This Court in the Duncan case construed the words "Any Contract" in its context to be all inclusive. Congress in the language used left no occasion to distinguish between a "fair and reasonable contract made without fraud after a cause of action has accrued" and one that is unfair and unreasonable and fraudulent. To make such a distinction would be to amend the law and would amount to judicial legislation.

Moreover, this Court held in the Duncan case that Congress made no distinction between contracts made before and contracts made subsequent to the accrual of a cause of action. The cases relied upon by the Michigan Court holding that Section 5 applies to contracts made before but not after the cause of action has accrued do not even suggest that any distinction between fair and unfair contracts is to be made where they are made before the cause of action arises. "Any Contract" in Section 5 which applies in both instances under the Duncan case is just as all inclusive in the one instance as in the other.

C.

The Michigan Court decided the main questions Contrary to controlling Federal decisions.

The United States Court of Appeals, Sixth Circuit, in *Akerly* v. *New York Central Railroad Company*, 168 F (2nd) 812, decided prior to the decision in the instant case, held identical contracts to be invalid under Section 5. The Court, after citing the Duncan case, said (Page 815):

> We think the inclusion of this section in the Employers' Liability Act, with its creation of new obligations against the employer, makes the venue provision an inherent part of the employers liability. An attempt to limit it by contract is an attempt to exempt the railroad from liability and is void.

This case was decided June 14th, 1948 (R. 68). The Michigan Court decided the case at bar June 29th, 1948 (R. 57). The Akerly decision was called to the court's attention in the Application for Rehearing (R. 64, 68) filed July 17th, 1948 (R. 59).

The correct answer to the question before the court depended upon the construction of a federal statute. This court said in *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, 62 Sct. 6, 10, that in such a case:

> Consequently the action of a state court must be in accord with the federal statute and the federal rule as to its application rather than state statute, rule or policy.

The Court thus refused to follow the decision of this Court in the Duncan case; that of the United States Court of Appeals in the *Akerly* case and numerous other Federal District Courts and State Courts. Instead it followed the line of cases that, for the most part, held to the theory that only conracts made before the accrual of the cause of action are void under Section 5 (R. 55).

The Court erred in its refusal to follow the federal rule and in failing to grant Petitioner's application for a rehearing when that rule as announced by the United States Court of Appeals for the Sixth Circuit, which embraces the State of Michigan was called to its attention.

D.

The Contracts are Invalid.

Other State and Federal Courts have held such contracts invalid.

In *Peterson* v. *Ogden Union Railway and Depot Co.*, 175 Pac. (2nd) 744, (1946) the Supreme Court of Utah in denying validity to the contract there involved, pointed out the comprehensive nature of Section 55 and the real purpose of Section 56.

After the accident, but before suit was brought, the Company advanced the injured employee $500.00 on account of his injuries and required him to sign an agreement that in case a final settlement could not be reached, he would not bring suit in any jurisdiction outside of the District Court of the United States, Northern Division, of Utah.

Suit was filed in a State Court. Before trial on the merits of the case, the trial court, on motion of the company, dismissed the action on the ground that the contract was binding on Peterson. He appealed and the Supreme Court in reversing the judgment of the trial court, said:

> "It is apparent that Congress by the use of the very broad terms of Section 5 intended to protect fully the rights given employees by the Chapter. The section says 'any' device whatsoever the purpose or intent of which shall be to enable the carrier to exempt itself from 'any' liability created by the chapter, shall to that extent be void. The Supreme Court of the United States in *Duncan* v. *Thompson*, Jan., 1942, 315 U. S. 1,

62 S. Ct. 422, 86 L. Ed. 565 held the section applied to contracts made after the cause of action arose as well as those made before. Regardless of the intention of the parties if the practical effect of the contract or device is to exempt the carrier from any liability imposed by the chapter, the contract or device is void. *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 32 S. Ct. 589, 56 L. Ed. 911; *McAdow v. Kansas City Western R. Co.*, 100 Kan. 309, 164 P. 177, L. R. A., 1917 E., 539; *Larson v. Lewis-Simas-Jones Co.*, 29 Cal. App. 2d 83, 84, P. 2nd 296.

• • •

"Section 6 makes available to the plaintiff several courts in which he may bring the action. Clearly that section gives the employee substantial benefits. It was not only for his convenience and to enable him to choose a court where the expense of litigation would not be prohibitive, but was to give him the right to select the courts in which he considers it would be most advantageous for him to bring his action.

• • •

"The defendant contends that the plaintiff exercised his right to choose the court in which to bring his action by entering into the contract, and, inasmuch as the plaintiff had the right to choose and exercised that right by choosing the federal court, Sections 5 and 6 of the Act are not contravened by the contract.

"The spirit and the letter of the Act require that an injured employee be left free and uninfluenced by the carrier in selecting the court in which to bring his action. The liableness to a judicial pronouncement of liability in any of the courts enumerated in section 6 of the Federal Employers' Liability Act is, itself, a 'liability' as that word is used in Section 5 of the Act. Hence so much of the contract as attempts to limit the courts in which plaintiff may bring his suit is void under Section 5 and should not be enforced."

The Utah Supreme Court quotes extensively and with approval from *Sherman v. Pere Marquette Ry. Co.*, 62 F. Supp. 590 (1945), decided by Judge Barnes, in the United

States District Court, Northern District of Illinois, Eastern Division, at Chicago.

In the *Sherman* case, the company advanced the injured employee, at his request, $200.00 per month for a period of nine months, a total of $1,800.00. At the time of receiving each payment, Sherman signed a contract similar to the contracts here, in which he agreed that he would sue only in the Circuit Court of Wayne County, Michigan, or in the Federal Court, at Detroit, Michigan.

Sherman filed suit in the Federal Court at Chicago and the Company moved to dismiss on the ground of improper venue, contending that proper venue was fixed by the agreement.

In addition, the Company set up facts similar to the allegations in the Complaint here tending to show how greatly it would be inconvenienced in getting its witnesses to Chicago and that it would be put to added expense in trying the case at Chicago.

In holding the agreements void, the Court said:

> "The comprehensive phraseology of Section 5 certainly includes within its meaning a contract the purpose or intent of which is to enable the common carrier to exempt itself from liability to suit for a violation of the act, 'in the district * * * in which the defendant shall be doing business at the time of commencing such action.' The beneficial effects of the statute should not be whittled away by the court by distinguishing between adjective and substantive rights and adjective and substantive duties or liabilities. Adjective rights and their correlative duties or liabilities are frequently as important as substantive rights, and substantive rights and their correlative duties or liabilities are of little value without adjective rights and their correlative duties or liabilities whereby the substantive rights may be enforced. It has been said that the word 'liability' in Section 5 is limited to the liability of the

carrier to respond in damages, but when we say that we beg the real question, which is as to the meaning of the word 'liability' in Section 5. It is said that venue is a privilege that may be waived, and that the case of *Neirbo Co. v. Bethlehem Corp.*, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437, lends support to this view. Generally speaking, venue is a privilege which may be waived, but it may not be contracted away in the face of a specific statute which prohibits such contracting, as does Section 5 of the Employers' Liability Act under consideration."

"The court is of the opinion that the contracts in question in this suit are void because they are prohibited by Section 5 of the Federal Employers' Liability Act.

"The court's attention has been called to the decisions in *Clark v. Lowden*, D. C. 48 F. Supp. 264, *Herrington v. Thompson*, 61 F. Supp. 903, filed in the Western District of Missouri, *Detwiler v. Lowden*, 198 Minn. 185, 269 N. W. 367, 838, 107 A. L. R. 1054, and *Peterson v. N. Y. Central R. Co.*, a decision without opinion by one of the judges of this court. These four decisions do support the contentions of the defendant and are worthy of great respect, but this court finds itself unable to follow them.

See also *Fleming v. Husted*, 68 F. Supp. 900, and *Krenger v. Penn. R. Co.*, 8 F. R. D. 65.

The *Krenger* case was affirmed by the United States Court of Appeals, Second Circuit, 174 F. (2nd) 556 (April 14, 1949).

In that case a contract, in substance, identical with the contracts in the case at bar was executed by Krenger upon the advancement to him for living expenses by the company of $250.00.

The majority opinion is written by Judge Clark with Judge Hand concurring in the result reached and Judge Swan dissenting.

The following language of Judge Clark seems pertinent in view of the argument we have made here (Page 559):

> Thus the railroad was contracting against its liability to be sued, i.e., to have its legal relations changed—adversely—in any one of the several jurisdictions, in order to obtain immunity from such change except under the favoring conditions of a single chosen jurisdiction. Hohfeld, Fundamental Legal Conceptions, 8, 50, 58-60, 1923, citing and quoting judicial usage; Corbin, Legal Analysis and Terminology, 29 Yale L. J. 163, 169, 170; 1 Restatement, Property Section 3, comment a and Special Note, 1936.
>
> Of course we should not press this overfar; in fact we need hardly have gone beyond the statutory background itself had not the judges sustaining these particular contracts relied, without other than an *ipse dixit*, upon some inherent circumscribed meaning necessarily to be attributed to the phrase. Once this is effectively challenged—indeed, once the compulsion thought to inhere in the word itself is dissipated—there is nothing left to restrict the broad sweep of the statute. And, indeed, any possibility that the statutory phrase could be limited to the duty to pay damages only would seem already foreclosed by *Duncan* v. *Thompson*, *supra*. That case, it will be recalled, held invalid an agreement requiring the repayment of sums advanced as a *condition precedent* to the bringing of action. If the statutory phrase applies to a condition requiring fulfillment *before* an action may be brought, it would seem just as applicable to a condition as to the *place where* action must be brought.
>
> I conclude that under the statute the contract relied on as a defense is invalid.

We shall not at this time discuss other cases in which the contracts have been held valid. These cases are cited in footnote 1, pages 3-7 above and are cited by the Michigan court in its opinion (R. 55).

The Court erred in holding that the contracts here are valid and legal and binding upon petitioner.

E.

The judgment of the lower State Court was correct and should be affirmed.

In passing the Federal Employers' Liability Act in 1908 and in strengthening it in 1910 by enacting the venue and jurisdictional provision in its present form, Congress intended to exercise its power under the commerce clause of the Constitution to its fullest extent.

The then current injustice which received the most studied notice in the report of the Committee in charge of the original bill was the one with which we are here concerned, the practice of the carriers to exempt themselves by contract or other device from liability in personal injury cases, whether the injuries resulted from the employer's negligence or from any other cause. This was removed by the broad language of Section 5.

The reason for this broad and complete exercise of power, and its purpose, are evidenced by the history of the legislature. Congress intended, insofar as it was possible, to remove preventable hazards from operative railroading, to abolish the injustices that were falling so heavily upon the railroad workers and to place the injured railroad man and his next-of-kin on an equal footing with his employer, in bargaining for settlements and in Court, if suit was brought. If Congress fell short of that purpose it could not have been from lack of power or from lack of intention to use all of the power it had. The trial court, therefore, reached the correct result.

For the reasons above given, the Supreme Court of Michigan erred in reversing instead of affirming the judgment of the Circuit Court of Calhoun County, Michigan; in entering a decree restoring the temporary injunction as

granted by the lower court and in remanding the cause for further proceedings.

Conclusion.

Petitioner therefore urges that the judgment of the Supreme Court of Michigan in all particulars be reversed and that the judgment of the Circuit Court of Calhoun County, Michigan be affirmed.

Respectfully submitted,

MELVIN L. GRIFFITH,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
FRANCIS H. MONEK,
Chicago, Illinois.

JOHN L. MECHEM,
Battle Creek, Michigan,
Of Counsel.

APPENDIX

IN THE
SUPERIOR COURT OF COOK COUNTY, ILLINOIS.

Alexander Boyd, *Plaintiff*, vs. Grand Trunk Western Railroad Company, a corporation, *Defendant*.	No. 47 S 10416 Jury trial is demanded.

Complaint at Law.

The plaintiff, Alexander Boyd, by Edward B. Henslee, his attorney, says:

1. Defendant is a corporation organized and existing under and by virtue of the laws of the State of Michigan and under its charter is empowered to and does operate a system of railroad running through the States of Michigan and Illinois, as a common carrier by railroad of passengers and freight for hire, with one of its lines running into Chicago, Cook County, Illinois, where it maintains an office in charge of officers and agents upon whom service of progress may be had.

2. At the time of the accident and injury hereinafter complained of the plaintiff was a yard brakeman employed by the defendant in its Nichols Yard at or near Battle Creek, Michigan, and in his line of duty engaged in the switching of cars with interstate shipments therein, and by reason thereof plaintiff and defendant were engaged in interstate commerce and transportation and plaintiff's action herein arises under the Act of Congress of April 22, 1908, 35 Stat. 65, Chap. 149, with amendments thereto, com-

monly known as the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51-59, and the Federal Safety Appliance and Equipment Act, 45 U. S. C. A., Sections 1-16, being an Act of Congress of March 2, 1893, Chapter 196, 27 Stat. 531, with amendments thereto to the present time.

3. At the time of, before and after the acts of negligence hereinafter set forth, the plaintiff was in the exercise of all due care and caution for his own safety.

4. On or about November 23, 1946, at approximately 7:30 P. M. the plaintiff was a yard brakeman and a member of a crew engaged in the making up and breaking up of trains and the switching of cars for the defendant at its Nichols Yard at or near Battle Creek, Michigan, and it became and was his duty in the interest of and in furtherance of the defendant's business to disconnect one car from a cut of about thirteen cars, and it then and there became and was the duty of the defendant to maintain its cars and equipment thereon and also to operate, control and manage its locomotive and cars so as not to injure the plaintiff rightfully along its lines of railroad.

5. The defendant disregarded its duty toward the plaintiff at the time and place set forth, in one or more of the following ways:

a) Defendant was careless and negligent in that it hauled or used along its lines a car which would not uncouple automatically, contrary to and in violation of the laws of the United States as set forth in 45 U. S. C. A., Chapter 1, Section 2 thereof.

b) Defendant was careless and negligent in the control, management and operation of its locomotive and cars.

c) Defendant was careless and negligent in not giving the plaintiff time to get onto the stirrup on one of its cars in order to disconnect another, contrary to and in violation of the usual method of doing this work.

d) Defendant was careless and negligent in not using ordinary care to furnish the plaintiff with a reasonably safe place in which to do his work in that it allowed one of its ties to protrude above the ballast a distance of four to five inches at a much used and well traveled place on its premises.

e) Defendant was careless and negligent in not using ordinary care to reasonably light its premises so that its men in their line of duty could see the hazardous condition of the premises and protect themselves against stumbling over protruding ties at a much used and well traveled place along its lines of railroad.

6. As a direct and proximate result of one or more of the foregoing acts of negligence the plaintiff had to hurry to catch some cars which were being kicked and did not have time to get onto the stirrup of the car and when he tried the cutting lever to disconnect the car he found it to be disconnected and the unexpected giving of the cutting lever caused him to strike a protruding tie and threw him with great force and violence to and upon the ground and divers objects thereon, and by reason thereof he was caused to be so injured that divers bones of his body and back were dislocated, broken and compressed; divers membranes, muscles, ligaments, nerves and blood vessels of his body were sprained, torn, cut, bruised and injured; divers other organs of his body were displaced, bruised, torn, injured and their functions impaired; his brain and nervous system were greatly shocked, injured, and their functions impaired; he became sick, sore, lame and disabled from thence hitherto; he suffered great pain and anguish by reason of his said injuries, and will in the future continue to suffer therefrom; and by reason of his said injuries he expended and incurred great liability and indebtedness endeavoring to be cured of his injuries, and will in the future expend and incur considerable sums of money endeavoring to be cured of his injuries, and the plaintiff has

and will be unable to attend to his customary affairs and business, and he has and will be disabled for an indefinite time in the future, the exact time being unknown to the plaintiff at the present time.

To the damage of the plaintiff in the sum of One Hundred Thousand Dollars ($100,000.00) and therefor he brings this suit.

EDWARD B. HENSLEY,
Attorney for Plaintiff.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, HENRY SONNENSCHEIN Clerk of the Superior Court of Cook County, in and for the State of Illinois, and the keeper of the records, files and seals thereof, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain complaint Filed in my office on the 25th day of June, A. D. 1947 a certain cause now pending in said Court on the law side thereof, wherein Alexander Boyd, Plaintiff, and Grand Trunk Western Railroad Co., a corp., defendant.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at Chicago, this 20th day of December, A. D. 1948.

(SEAL) Henry Sonnenschein, Clerk.

SUPREME COURT, U. S.
FILED
OCT 10 1949

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 17

ALEXANDER BOYD,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

MELVIN L. GRIFFITH,
Chicago, Illinois,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
FRANCIS H. MONEK,
Chicago, Illinois,

JOHN L. MECHEM,
Battle Creek, Michigan,
Of Counsel.

CHAMPLIN-SHEALY COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 17

ALEXANDER BOYD,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

Respondent's brief requires no detailed answer.

Counsel take the word "liability" out of its context; select one of the many meanings of the word from Webster's Dictionary; conclude that the word, as used in Section 5, relates only to liability to respond in damages, as provided in Section 1 and seek to remove the contracts dealing with rights under Section 6 from the protecting coverage of Section 5 by applying the well-established principle that the requirement of the general venue statute that a defendant be sued in a particular place grants a privilege which may be waived. When Section 6 was enacted giving the plaintiff the choice of any one of three places in which to bring his suit, venue was no longer a privilege to be

insisted upon or waived, but a liability within the meaning of Section 5.

The principle, of course, does not apply here. Respondent's line of reasoning is climaxed by the assertion (Page 11):

> It is significant that Petitioner has not produced one single decision of this Court which holds that after a cause of action has come into being the parties may not waive their statutory venue privileges.

Since counsel are really talking about a case that might arise under the general venue statutes where a plaintiff is required to bring his suit in a particular place, this assertion seems appropriate and if it is a challenge calling for such a decision, we must admit failure to produce such a decision.

But, if counsel are arguing the case at bar, arising under a law which gives to plaintiff a choice of places in which to bring his suit, we believe the challenge is met by the decisions in the *Akerly* and *Krenger* cases and the case of *Duncan* v. *Thompson* which we do cite and upon which the two United States Courts of Appeals relied.

We are not here seeking to discover that often obscure and nebulous thing called Congressional intention. We know what Congress did and why the Federal Employers' Liability Act in its present form was enacted into law. It is only in the light of what Congress did that the words, in Section 5 with which we are here concerned including the word "liability," may be given a meaning.

If all that Congress did was to create liability or merely to change the liability of the existing common law right of action into the liability of a statutory right of action, without more, there would be no problem. But that is not all that Congress did. The very purpose of the Act was, not to create liability or merely make liability a statutory thing,

but, as was said in the debate in Congress on the 1910 Amendment:

> "The passage of the original Act and the perfection thereof by the amendments herein proposed stand forth as a declaration of public policy to radically change, as far as Congressional power can extend, these rules of the common law which the President, in a speech at Chicago, characterized as unjust."

In the case of *Wilkerson* v. *McCarthy*, 69 U. S. 413, recently decided by this Court, Mr. Justice Douglas, in a concurring opinion, said (Page 420):

> "While I join in the opinion of the Court, I think it appropriate to take this occasion to account for our stewardship in this group of cases.
>
> "The Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations. Not all these costs were imposed, for the Act did not make the employer an insurer. The liability which it imposed was the liability for negligence. But judges had created numerous defenses—fellow-servant rule, assumption of risk, contributory negligence—so that the employer was often effectively insulated from liability even though it was responsible for maintenance of unsafe conditions of work. The purpose of the Act was to change that strict rule of liability, to lift from employees the 'prodigious burden' of personal injuries which that system had placed upon them, and to relieve men 'who by the exigencies and necessities of life are bound to labor' from the risks and hazards that could be avoided or lessened 'by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work.'"

This language is in harmony with the theory of the Petitioner urged in this case all the way from the Michigan Courts to this Court. The primary purpose was to remove these injustices and to encourage the carriers to provide safe equipment and safe conditions of work for their employees.

The words, "any liability created by this chapter," as used in Section 5, have no meaning at all, unless they relate to every provision of the Act from Section 1, which abolished the fellow-servant rule, to Section 10, which imposes a penalty for violation of any of its provisions. All of these provisions including Sections 5 and 6 were enacted for the same purpose—to remove injustices that had developed in connection with the employees' right of action for injuries and death and to promote safety for the men. If Section 5 does not relate to all of these provisions, then the carrier may by these contracts with necessitous employees, completely nullify every provision of the Act and make of the entire law a dead letter on the statute books of the Nation.

Duncan v. *Thompson*, we believe, answers every question that has been raised in this case. The Supreme Court of Michigan does not even mention it. Respondent merely mentions it in its brief and does not even try to explain it away except by quoting from *Clark* v. *Loudon*, 48 F. Supp. 261, 265. Both the Michigan Court and Respondent ignore Petitioner's theory of the case based on what Congress really did and rely upon selected definitions of the one word "liability" and upon many inapposite authorities.

Aside from this, Respondent in its Brief:

1. (Page 5) In effect misquotes Section 1 of the Act. "Negligence *of any of the officers, agents or employees* of the carrier" and not "negligence * * * of the carrier" is what gives rise to liability. The words in italics omitted by Respondent, abolish the fellow-servant rule and constitute the expression of the prime purpose of the Section.

2. (Page 8) Sets up excerpts from the Congressional Record of the debate on the venue provision of the Act originally proposed in the House but which was rejected in the Senate for a substitute provision in the language of the present Section 6. It was this final provision which, as Senator Borah stated in the Senate:

"Enabled the plaintiff to find the corporation at any point or place or State where it is actually carrying on its business, and there lodge his action, if he chooses to do so."[1]

3. (Page 12) Quotes and relies upon 17 C.J.S. Contracts, Sec. 229, Page 605, stating the rule prior to *Duncan* v. *Thompson* that contracts affecting Venue prior to the accrual of a cause of action are invalid but that the rule does not apply to contracts made after the cause of action has accrued.

4. (Page 17) Puts these contracts made with necessitous employees by the claim agents of the carrier on a par with an order of a District Court, after hearing, transferring a case under 28 U.S.C. Sec. 1404 (a).

5. (Page 28) Cites a Washington State Court case to the effect that a State Court is not bound by a decision of a United States Court of Appeals in a Circuit embracing the State on a Federal question growing out of a Federal Statute when numerous cases decided by the Michigan Supreme Court holding that it was so bound were called to the Court's attention in the Application for Rehearing, along with the *Akerly* case (R. 43-44).

We submit that the rule of the *Duncan* case and of the State and Federal Court decisions following it, should be reaffirmed in this case.

---

[1] 45 Cong. Rec. Pt. 4, p. 4043.

Respectfully submitted,

MELVIN L. GRIFFITH,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
FRANCIS H. MONEK,
Chicago, Illinois.
JOHN L. MECHEM,
Battle Creek, Michigan,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1948~~ 1949

ALEXANDER BOYD,

Petitioner

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT

BRIEF OF GRAND TRUNK WESTERN RAILROAD COMPANY IN OPPOSITION

H. VICTOR SPIER
Attorney for Respondent
Business Address:
441 E. Jefferson Avenue,
Detroit, Michigan

GEORGE F. GRONEWOLD
Of Counsel
Business Address:
1514 Security National Bank Building,
Battle Creek, Michigan

ECLIPSE BRIEF AND RECORD SERVICE. PHONE WO. 2-9536

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 486

ALEXANDER BOYD,

Petitioner

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT

BRIEF OF GRAND TRUNK WESTERN RAILROAD COMPANY IN OPPOSITION

I

OPINION BELOW

Grand Trunk Western R. Co. v. Boyd, 321 Mich. 693, 33 N.W. (2d) 120. (R. 52)

II

JURISDICTION

Respondent agrees that the Court has jurisdiction.

III

QUESTIONS PRESENTED

Following the opinion of the Court below and the denial by that Court of Petitioner's application for a rehearing, Petitioner voluntarily filed suit against Respondent in the District Court of the United States for the Eastern District of Michigan, Southern Division, to recover damages for the same alleged cause of action for which the original case was filed in the Superior Court of Cook County, Illinois, the prosecution of which was enjoined by the Supreme Court of Michigan (R. 9, 97). The Complaints in the two cases are identical (see appendix to Petitioner's Brief, p. —, and the appendix to this Brief). The Michigan case is now at issue and is awaiting trial. The action of Petitioner in commencing it is in compliance with his contracts (R. 25-26, 26-27) and the injunction issued out of the Supreme Court of Michigan (R. 9, 97) and is tantamount to abandonment of his case in Illinois, and renders the whole controversy moot.

Respondent submits that the following two questions are dispositive of the instant application for certiorari:

1. Whether the voluntary filing of suit in the District Court of the United States for the Eastern District of Michigan, Southern Division, renders the case moot.

2. Whether there is a federal question of substance involved, not heretofore decided by this Court or decided in a way probably not in accord with applicable decisions of this Court.

IV

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the case with the exception that the following should be added:

In the Order of the Supreme Court of Michigan, dated October 21, 1948, staying all proceedings pending determination by this Court of Petitioner's application for Writ of Certiorari, it was provided that the injunction theretofore issued by it on December 2, 1947 (R. 9) "shall remain in full force and effect" (97). Six days thereafter, on October 27, 1948, Petitioner, in compliance with his contracts (R. 25-26, 26-27) and the Orders of the Supreme Court of Michigan (R. 9, 97), filed suit in the District Court of the United States for the Eastern District of Michigan, Southern Division, for damage for the identically same alleged cause of action that was involved in the proceedings before the Supreme Court of Michigan (Appendix hereto).

The accident complained of happened on November 23, 1946 (R. 18) and the Statute of Limitation (45 U.S.C.A.

56, Sec. 6, 36 Stat. 291) will not bar commencement of an action in any permitted jurisdiction for nearly a year yet, and the filing of the suit in Michigan was wholly voluntary and without compulsion or necessity of any kind other than the fulfillment of Petitioner's contractural obligations.

V

ARGUMENT

1. **The case is moot.** The filing of the suit in the District Court of the United States for the Eastern District of Michigan, Southern Division, was in accordance with applicant's contractural obligations (R. 25-27), and the Orders of the Supreme Court of Michigan (R. 9, 97), and is tantamount to an abandonment by Petitioner of his suit in Illinois. The Federal Court case in Michigan can proceed to trial and final determination of every issue in it (which includes every issue in the Illinois case) regardless of whether a Writ of Certiorari is issued in this proceeding or of the ultimate determination of the issue presented by Petitioner if the Writ is issued.

It is respectfully submitted that this renders the case moot.

C. M. Patton & Co. v. United States, 289 U.S. 705, 53 S. Ct. 687;

Hargis v. Bradford, 283 U.S. 781, 51 S. Ct. 342.

This Court will not issue a Writ of Certiorari or otherwise proceed to an adjudication where there is no subject matter on which the judgment of the Court can operate.

Montgomery Ward & Co. v. *U.S.*, 326 U.S. 690;
Ex Parte Bacz, 177 U.S. 378, 390;
Brownlow v. *Schwartz*, 261 U.S. 216, 217;
Chandler v. *Wise*, 307 U.S. 474, 477-478;
Director of Prisons v. *Court of First Instance of the Province of Cavite*, 239 U.S. 633;
Jones v. *Montague*, 194 U.S. 147;
Mills v. *Green*, 159 U.S. 651, 653.

This is so notwithstanding the contention that a determination of the issue is necessary because of contemplated future cases.

Commercial Cable Co. v. *Burleson*, 250 U.S. 360.

The Court is without power to decide moot questions or give advisory opinions.

St. Pierre v. *United States*, 319 U.S. 41.

And the Court should not pronounce judgment on abstract questions even if its opinions might influence future actions under like circumstances.

Richardson v. *McChesney*, 218 U.S. 487, 492.

A similar principal was involved in the recent case of *Brotherhood of Locomotive Engineers, et. al.*, v. *United*

States, 69 S. Ct. 137, and this Court denied Certiorari upon Respondent's objection that settlement between the parties of the question at issue rendered the case moot.

It is no answer for Petitioner to say that he may commence as many actions as he may wish in different permitted jurisdictions. The least that can be said is that the filing of the case in Michigan demonstrates that Petitioner is willing to have his case tried in Michigan if it is reached for trial first and that being true the suggestion leads to the inevitable conclusion that there is no substance to it. This Court ought not to permit itself to be used as a cat's paw in that kind of a game.

2. There is no federal question of substance involved, not heretofore decided by this Court or decided in a way probably not in accord with applicable decisions of this Court.

In the recent case of *Holmes* v. *United States*, 69 S. Ct. 70, this Court had under consideration the provisions of Section 2 of the Suits in Admiralty Act, 46 U.S.C.A. 3741 et seq. 41 Stat. 525, which provides that "* * * such suits *shall* be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found." (emphasis ours). The suit was brought in a district other than where the petitioner resided or where the vessel was at the time suit was filed, and the United States answered to the merits, leaving all questions of jurisdiction to the court. This Court held

that, notwithstanding the apparent mandatory provision of the statute designating the districts in which such a suit "shall" be filed, it related only to venue which could be, and was waived. The decision of this Court was unanimous, and we quote from the opinion as follows:

> "The ruling of the District Court that the provisions of Section 2 of the Suits in Admiralty Act, directing where suits shall be brought, were jurisdictional was in our view erroneous. Those provisions properly construed relate to venue.
>
> The section relates not to libels in rem but to libels in personam. A similar provision in §5 of Tucker Act, 24 Stat. 506, 28 U.S.C. (1946 Ed.) §762, 28 U.S.C. §1402, 28 U.S.C.A. §1402, was held to prescribe venue and hence could be and was waived by failure to object before pleading to the merits. United States v. Hvoslef, 237 U.S. 1, 11, 12, 35 S. Ct. 459, 462, 59 L. Ed. 813, Ann. Cas. 1916A, 286; Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19, 24, 35, S. Ct. 496, 497, 59 L. Ed. 821, Ann. Cas. 1915D, 1087. An analogous provision in the Jones Act, 41 Stat. 1007, 46 U.S.C. §688, 46 U.S.C.A. §688, was construed the same way. Panama R. Co. v. Johnson, 264 U.S. 375, 384, 385, 44 S. Ct. 391, 392, 393, 68 L. Ed. 748. And we recently indicated that that was the correct construction of comparable provisions of §2 of the Public Vessels Act, 43 Stat. 1112, 46 U.S.C. §782, 46 U.S.C.A. §782 (Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 224, 65 S. Ct. 639, 644, 89 L. Ed. 901), an act which is similar in purpose and design to the present one. See American Stevedores v. Porello, 330 U.S. 446, 452, 453, 67 S. Ct. 847, 850, 851, 91 L. Ed. 1011.

> Congress, by describing the district where the suit was to be brought, was not investing the federal courts 'with a general jurisdiction expressed in terms applicable alike to all of them'. See Panama R. Co. v. Johnson, supra, 264 U.S. page 384, 44 S. Ct. 393, 68 L. Ed. 748. It was dealing with the convenience of the parties in suing or being sued at the designated places. The purpose of the Act was to grant seamen relief against the United States in its own courts. The concepts of residence and principal place of business obviously can have no relevance when applied to the United States. It is ubiquitous throughout the land and unlike private parties is not centered at one particular place. The residence or principal place of business of the libelant and the place where the vessel or cargo is found may be the best measure of the convenience of the parties. But if the United States is willing to defend in a different place, we find nothing in the Act to prevent it."

The language of the venue section of the Federal Employers' Liability Act (45 U.S.C.A. §56, Sec. 6, 36 Stat. 291) is not mandatory in its wording,—it says that such suits "*may* be brought", etc. (emphasis ours)—whereas the wording of Section 2 of the Suits in Admiralty Act involved in the *Hoiness* case was that "such suits *shall* be brought", etc. (emphasis ours). Certainly, the issue was much stronger in the *Hoiness* case than in the instant case.

We, therefore, respectfully submit that whatever federal question there may be in the instant application, it is *not* one of substance and that it has already been decided by this Court contrary to the contention of Petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for writ of Certiorari should be denied.

Respectfully submitted,

H. Victor Spike
Attorney for Respondent

Business Address:
441 E. Jefferson Avenue,
Detroit 26, Michigan

George F. Gronewold
Of Counsel

Business Address:
1514 Security National Bank Building,
Battle Creek, Michigan

APPENDIX

DOCKET

DOCKET 7718

TITLE OF CASE

Alexander Boyd,
Plaintiff

v.

Grand Trunk Western Railroad Company,
a corporation,
Defendant

Trespass
Jury trial claimed by Pltf 10/27/48

ATTORNEYS

Emerson H. Shink,
2361 Guardian Bldg.
Detroit 26, Mich.
For Plaintiff:

(Of Counsel)
Edward B. Henslee and
Walter N. Murray,
139 N. Clark St., Suite 810,
Chicago 2, Ill.

For Defendant:
H. V. Spike
William W. Macpherson,
441 E. Jefferson,
Detroit 26, Mich.

Date			Plaintiff's Account	Received	Disbursed	Date			Defendant's Account	Received	Disbursement
Month	Day	Year				Month	Day	Year			
Oct.	27	1948	Filing fees— E. H. Schink	$15.00							

10

UNITED STATES DISTRICT COURT

Date Month	Day	Year	Filings—Proceedings	No. of Words	Clerk's Fees Plaintiff's	 Defendant	Amount Reported in Emolument Report
Oct.	27	1948	Complaint and demand for jury trial filed		15.00		
Oct.	27	1948	Summons issued				
Nov.	2	1948	Summons returned and filed				
Nov.	19	1948	Answer filed				
Nov.	29	1948	Reply filed				
Dec.	14	1948	Proof of service filed				

11

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALEXANDER BOYD,
Plaintiff

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation,
Defendant

Civil Action
No. 7718
Trial by Jury
Is Demanded

COMPLAINT

EMERSON H. SCHINK
Attorney for Plaintiff

2361 Guardian Building
Detroit 26, Michigan
CAdillac 2270

EDWARD B. HENSLEE and
WALTER N. MURRAY
Attorneys-at-Law

139 North Clark Street
Suite 810
Chicago 2, Illinois
Of Counsel

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALEXANDER BOYD, *Plaintiff*	Civil Action
vs.	No. 7718
GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation, *Defendant.*	Trial by Jury Is Demanded

COMPLAINT

The Plaintiff, Alexander Boyd, for his complaint in the above entitled action, alleges and shows to this Honorable Court:

1. Plaintiff's action herein arises under the Federal Employers' Liability Act and exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

2. Defendant is a corporation organized and existing under and by virtue of the laws of the State of Michigan and under its charter is empowered to and does operate a system of railroad running through the States of Michigan and Illinois, as a common carrier by railroad of passengers and freight for hire, with one of its lines running into Detroit, Wayne County, Michigan, where it maintains an office in charge of officers and agents upon whom service of process may be had.

3. At the time of the accident and injury hereinafter complained of the plaintiff was a yard brakeman em-

ployed by the defendant in its Nichols Yard at or near Battle Creek, Michigan, and in his line of duty engaged in the switching of cars with interstate shipments therein, and by reason thereof plaintiff and defendant were engaged in interstate commerce and transportation and plaintiff's action herein arises under the Act of Congress of April 22, 1908, 35 Stat. 65, Chap. 149, with amendments thereto, commonly known as the Federal Employers' Liability Act, 45 U.S.C.A., Sections 51-59, and the Federal Safety Appliance and Equipment Act, 45 U.S.C.A., Sections 1-16, being an Act of Congress of March 2, 1893, Chapter 196, 27 Stat. 531, with amendments thereto to the present time.

4. At the time of, before and after the acts of negligence hereinafter set forth, the plaintiff was in the exercise of all due care and caution for his own safety.

5. On or about November 23, 1946, at approximately 7:30 P.M. the plaintiff was a yard brakeman and a member of a crew engaged in the making up and breaking up of trains and the switching of cars for the defendant at its Nichols Yard at or near Battle Creek, Michigan, and it became and was his duty in the interest of and in the furtherance of the defendant's business to disconnect one car from a cut of about thirteen cars, and it then and there became and was the duty of the defendant to maintain its cars and equipment thereon and also to operate, control and manage its locomotive and cars so as not to injure the plaintiff rightfully along its lines of railroad.

6. The defendant disregarded its duty toward the plaintiff at the time and place set forth, in one or more of the following ways:

a) Defendant was careless and negligent in that it hauled or used along its lines a car which would not uncouple automatically, contrary to and in violation of the laws of the United States as set forth in 45 U.S.C.A., Chapter 1, Section 2 thereof.

b) Defendant was careless and negligent in the control, management and operation of its locomotive and cars.

c) Defendant was careless and negligent in not giving the plaintiff time to get onto the stirrup on one of its cars in order to disconnect another, contrary to and in violation of the usual method of doing this work.

d) Defendant was careless and negligent in not using ordinary care to furnish the plaintiff with a reasonably safe place in which to do his work in that it allowed one of its ties to protrude above the ballast a distance of four to five inches at a much used and well traveled place on its premises.

e) Defendant was careless and negligent in not using ordinary care to reasonably light its premises so that its men in their line of duty could see the hazardous condition of the premises and protect themselves against stumbling over protruding ties at a much used and well traveled place along its lines of railroad.

7. As a direct and proximate result of one or more of the foregoing acts of negligence the plaintiff had to hurry to catch some cars which were being kicked and did not have time to get onto the stirrup of the car and when he tried the cutting lever to disconnect the car, he found it to be disconnected and the unexpected giving of the cut-

ting lever caused him to strike a protruding tie and threw him with great force and violence to and upon the ground and divers objects thereon, and by reason thereof he was caused to be so injured that divers bones of his body and back were dislocated, broken and compressed; divers membranes, muscles, ligaments, nerves and blood vessels of his body were sprained, torn, cut, bruised and injured; divers other organs of his body were displaced, bruised, torn, injured and their functions impaired; his brain and nervous system were greatly shocked, injured and their functions impaired; he became sick, sore, lame and disabled from thence hitherto; he suffered great pain and anguish by reason of his said injuries, and will in the future continue to suffer therefrom; and by reason of his said injuries he expended and incurred great liability and indebtedness endeavoring to be cured of his injuries, and will in the future expend and incur considerable sums of money endeavoring to be cured of his injuries, and the plaintiff has and will be unable to attend to his customary affairs and business, and he has and will be disabled for an indefinite time in the future, the exact time being unknown to the plaintiff at the present time.

WHEREFORE, the plaintiff claims judgment against the Defendant in the sum of One Hundred Thousand ($100,000.00) Dollars and costs of this action.

EMERSON H. SCHINK,
Attorney for Plaintiff,
2361 Guardian Building,
Detroit 26, Michigan.
Cadillac 2270

EDWARD B. HENSLEE and
WALTER N. MURRAY,
Attorneys-at-Law,

139 N. Clark St.,
Suite 810
Chicago 2, Ill.
Of Counsel

Dated: October 27, 1948.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALEXANDER BOYD,
Plaintiff

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation,
Defendant

Civil Action
No. 7718

DEMAND FOR JURY TRIAL

Now comes Alexander Boyd, Plaintiff, by his attorney, Emerson H. Schink, and hereby demands a trial by jury in the above entitled cause and number.

EMERSON H. SCHINK,
Attorney for Plaintiff,
2361 Guardian Building,
Detroit 26, Michigan.
Cadillac 2270

EDWARD B. HENSLEE and
WALTER N. MURRAY,
Attorneys-at-Law,
139 N. Clark St.,
Suite 810
Chicago 2, Ill.
Of Counsel

Dated: October 27, 1948.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALEXANDER BOYD,
Plaintiff

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation,
Defendant

Civil Action
No. 7718

ANSWER TO COMPLAINT

Now comes the above named defendant by H. V. Spike, its attorney, and answers plaintiff's complaint as follows:

1. It admits paragraph 1 of plaintiff's complaint.

2. It admits paragraph 2 of plaintiff's complaint.

3. It denies that a right of action exists. It admits the balance of paragraph 3 of plaintiff's complaint.

4. It denies paragraph 4 of plaintiff's complaint.

5. It denies paragraph 5 of plaintiff's complaint.

6. It denies paragraph 6 of plaintiff's complaint.

7. It denies paragraph 7 of plaintiff's complaint.

Further answering, defendant says that if a cause of action ever existed against it as in plaintiff's complaint alleged, the plaintiff thereafter on the seventh day of January, 1947, and for a good and valuable consideration, did release and discharge it of and from all claims, de-

mands, actions, causes of action, losses, costs, damages and expenses of whatsoever nature, kind or description, whether arising under any State or Federal statute or at common law, which may then have existed or might thereafter arise from, out of, or in any manner connected with or attributable to injuries received while employed as a switchman at or near Battle Creek, State of Michigan, on about the 23rd day of November, 1946, as well as from all claims or demands of any kind whatsoever. A copy of said release is hereto attached, marked "Exhibit A" and made a part hereof.

WHEREFORE this defendant having fully answered, asks to be discharged with its costs most wrongfully sustained.

H. V. SPIKE,
Attorney for Defendant,
441 E. Jefferson Avenue,
Detroit 26, Michigan.

Dated: November 18, 1948.

EXHIBIT "A"

GRAND TRUNK WESTERN RAILROAD COMPANY

P.I.R. No. 56007

Name—Alexander Boyd

Route 1—East LeRoy, Michigan.

Classification—Employee

For the sole consideration of Three Hundred and Seventy One ($371.00) Dollars paid to me by Grand Trunk Western Railroad Company, the receipt whereof I do hereby acknowledge, and without any other promise or agreement, written or oral, I do hereby release and discharge Grand Trunk Western Railroad Company, whether chargeable with negligence in the premises or otherwise, of and from all claims, demands, actions, causes of action, losses, costs, damages and expenses of whatsoever nature, kind or description, whether arising under any State or Federal statute or at common law, which may now exist or may hereafter arise from, out of, or in any manner connected with or attributable to injuries received while employed as switchman at or near Battle Creek, State of Michigan, on or about ~~the 23rd~~ day of November, 1946, as well as from all claims or demands of any kind whatsoever.

I have read and understand the above release.

Received $371.00 in full settlement Jan. 7, 1947.

Alexander Boyd (Signed)

(Seal)

RELEASE

Voucher—Paid by Draft—No. 3773

This release was read by and signed by the said Alexander Boyd in our presence at Battle Creek, Mich. on the 7th day of Jan. 1947.

Melba Clewien, 373 Main St., Battle Creek, Mich.

T. O. Leveille, 116 Fremont St., Battle Creek, Mich.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALEXANDER BOYD,
Plaintiff

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation,
Defendant.

Civil Action
No. 7718

PLAINTIFF'S REPLY TO DEFENDANT'S ANSWER

EMERSON H. SCHINK
Attorney for Plaintiff

2361 Guardian Building
Detroit 26, Michigan
CAdillac 2270

EDWARD B. HENSLEE and
WALTER N. MURRAY
Attorneys-at-Law
139 North Clark Street
Chicago 2, Illinois
Of Counsel

IN THE UNITED STATES DISTRICT COURT
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1. Plaintiff admits that he signed document designated release attached to defendant's Answer as Exhibit A on the date it bears but states the fact to be that he was induced to sign said document and to accept the consideration therein mentioned by the representations of defendant's Claim Agent and defendant's physician that plaintiff's back was merely sprained and that he could go to work at that time.

2. These representations of defendant's Claim Agent and doctor were false and fraudulent and made for the purpose of inducing plaintiff to accept the small sum of Three Hundred and Seventy One Dollars ($371.00) in settlement of his claim and if not made falsely and fraudulently, were made by mistake of the doctor in not correctly interpreting the X-rays which showed fractures in the vertebrae of plaintiff's back. The plaintiff signed said

release and accepted the amount heretofore set forth in reliance upon said false and fraudulent representations of the doctor and Claim Agent, relying upon the correctness of the doctor's interpretation of his injuries without knowledge of the serious nature of his injuries.

3. If from the evidence it is determined that there was no fraud in the execution of the release but that it was executed through mutual mistake of the parties as to the seriousness of the plaintiff's injuries, in that event the plaintiff wishes to do equity and asks leave of Court to tender the amount involved in the release.

WHEREFORE plaintiff prays that said release be held to be null and void for fraud in its execution or by reason of the mutual mistake of the parties and asks that the plaintiff may have such other and further relief as the Court shall deem just and fair.

EMERSON H. SCHUCK,
Attorney for Plaintiff,

2361 Guardian Building,
Detroit 26, Michigan.
Cadillac 2270

EDWARD B. HENSTEE and
WALTER N. MURRAY,
Attorneys-at-Law,

139 N. Clark St.,
Chicago 2, Ill.
Of Counsel

Dated: November 29, 1948.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 17

ALEXANDER BOYD,
Appellant,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
Respondent

BRIEF OF RESPONDENT AND APPELLEE

H. VICTOR SPIKE,
Attorney for Respondent,
441 E. Jefferson Avenue,
Detroit 26, Michigan.

GEORGE F. GRONEWOLD,
Of Counsel,
1514 Security National Bank Bldg.,
Battle Creek, Michigan.

Interstate Brief & Record Co., 170 East Larned St., Detroit 26, Michigan

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IN THE

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OCTOBER TERM, 1949

No. 17

ALEXANDER BOYD,
Appellant,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
Respondent

BRIEF OF RESPONDENT AND APPELLEE

I.

OPINION BELOW

Grand Trunk Western R. Co. v. Boyd, 321 Mich. 693, 33 N. W. (2d) 120 (R. 52).

II.

JURISDICTION

Respondent agrees that the Court has jurisdiction.

III.

QUESTIONS PRESENTED

Statement of question involved.

Were the contracts entered into between the Appellant and Respondent void under the provision of the Federal Employers' Liability Act, 45 U. S. C. A., Sections 55 and 56?

IV.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the case with the exception that the following should be added:

In the Order of the Supreme Court of Michigan, dated October 21, 1948, staying all proceedings pending determination by the Court of Petitioner's application for Writ of Certiorari, it was provided that the Injunction theretofore issued by it on December 2, 1947 (R. 9) "shall remain in full force and effect" (R. 97). Six days thereafter, on October 27, 1948, Petitioner, in compliance with his contracts (R. 19, 20, 21) and the Orders of the Supreme Court of Michigan (R. 9, 97) filed suit in the District Court of the United States for the Eastern District of Michigan, Southern Division, for damage for the identically same alleged cause of action that was involved in the proceedings before the Supreme Court of Michigan. (Appendix 13 Respondent's Brief in opposition to granting Writ of Certiorari.)

The accident complained of happened on November 23, 1946 (R. 14) and the Statute of Limitations (45 U. S. C. A. 56, Sec. 6, 36 Stat. 291) did not bar commencement of an action in any permitted jurisdiction for nearly a year thereafter, and the filing of the suit in Michigan was

wholly voluntary and without compulsion or necessity of any kind other than the fulfillment of Petitioner's contractual obligations.

V.

SUMMARY OF THE ARGUMENT

A.

Venue may be waived under the provisions of the Federal Employers' Liability Act. Section 6 of the Act (45 U. S. C., Sec. 56) provides that actions may be brought in the district of the residence of the defendant or in which the cause of action arose, or in which the defendant shall be doing business at the time of such action. Under the provisions of the Judicial Code it has been generally held without exception that venue is a privilege and may be waived by act or even by failure to act. The same rules should apply to venue under the Federal Employers' Liability Act as under the Judicial Code, and this Court has held that venue may be waived under the provisions of the Clayton Act where the provisions appear to be mandatory and not optional as under the Federal Employers' Liability Act.

B.

Since the amendment to the Judicial Code (28 U. S. C.) (1948) (1404 A.) affecting the doctrine of *forum non conveniens* which allows a Federal Court to transfer plaintiff's cause of action to another forum on the grounds of convenience it must follow that venue is a privilege and not a vested right. If a lower court on its own order can transfer a cause of action merely on the grounds of convenience, it must follow that an interested party could exercise the same privilege or right by written contract or otherwise.

C.

The contracts entered into are not void under the provisions of the Federal Employers' Liability Act. Section 5 of the Act (45 U. S. C., Section 55) condemns contracts and devices tending to exempt the railroad from any liability created by the Act. The only liability created by the Act is the liability for damages for injuries or death set forth in Section One thereof. Section 6 of the Act confers upon the employee the privilege of selecting the venue in which to enforce that liability. It does not create a new or additional liability. The liability of the railroad is the same wherever enforced. The choice of a venue within which to determine that liability cannot be deemed an exemption from such liability. It is a choice that at some time the plaintiff is bound to make in order to enforce his rights. Hence, the contract providing that any trial that is to be held in the State or Federal Court sitting within the State where the accident occured and where the plaintiff resided is not condemned by the letter or spirit of the act.

D.

The majority view is that the Michigan Court was not in error in refusing to follow the decision of the United States Court of Appeals, Sixth Circuit.

E.

The filing of the suit in the District Court of the United States for the Eastern District of Michigan, Southern Division, was in accordance with appellant's contractual obligations and orders of the Supreme Court of Michigan, and is tantamount to an abandonment by Petitioner of his suit in Illinois.

ARGUMENT

A.

A-1. THE CONTRACT DOES NOT VIOLATE THE FEDERAL EMPLOYERS' LIABILITY ACT AS ITS SUBJECT MATTER IS "VENUE" NOT "LIABILITY."

The provisions of the Act material hereto are:

> Sec. 1. "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury * * * resulting in whole or in part from the negligence * * * of such carrier." (45 U. S. C. A. 51.)
>
> Sec. 5. "Any contract * * * the purpose or intent of which shall be to enable any common carrier to exempt himself from any liability created by this chapter, shall be to that extent void." (45 U. S. C. A. 55.)
>
> Sec. 6. "Under this chapter an action may be brought in a District Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." (45 U. S. C. A. 56.)

The liability mentioned in Section 5 is that created by Section 1, for no other part of the Act creates any liability. Section 6 obviously relates to venue and not to liability. In the instant case the liabilities of the parties were measured by Section 1 before the contracts were entered into. They are still measured by Section I. Liability is unchanged; only venue is affected. Venue may be waived in numerous ways, including by contract.

Section 6 of the Employers' Liability Act is obviously a venue statute relating to a particular class of cases, and

must be considered simply as an amendment to the general venue statute, Section 51 of the Judicial Code. The provisions of Section 6 relating to venue could well have been included in the general venue statute, but it was more convenient to couple them with the provisions creating the causes of action to which they apply. That Section 6 is simply an amendment to the general venue statutes designed to deal with cases under the Federal Employers' Liability Act is made clear by the recent decision of the Supreme Court in *Baltimore & Ohio Railroad Company v. Kepner*, 314 U. S. 44. Both the majority opinion by Justice Reed and the dissenting opinion by Justice Frankfurter recognize this. Referring to the legislative history of Section 6, the majority says:

> "No doubt this language was actually considered by the Senate Judiciary Committee, as well as the language of the general venue statute for which the committee was providing an exception." Page 50.
>
> "The privilege was granted because the general venue provisions worked injustices to employees." Page 53.
>
> "When the section was enacted it filled the entire field of venue in federal courts. A privilege of venue granted by the legislative body which enacted this right of action, cannot be frustrated for reasons of convenience or expense." Page 54.

The dissenting opinion of Justice Frankfurter also recognizes Section 6 as simply another venue statute:

> "The phrasing of the section is not unique: it follows the familiar pattern generally employed by Congress in framing provisions (citing illustrations). The decision cannot rest, therefore, upon any peculiarities of the language of the provisions." Page 56.

> "Nothing in the language or the history of the venue provisions of the Act differentiates it from the numerous other venue provisions of the Judicial Code." Page 62.

A multitude of cases hold that the provisions of the general venue act may be waived. It follows that the venue privilege under Section 6 of the Federal Employers' Liability Act may be waived.

The legislative history of Section 6 of the Employers' Liability Act makes it clear, first, that the word "liability" as used in Section 5 refers only to the liability mentioned in Section 1; and second, that Congress had no intention of creating any rule of venue so rigid that it could not be waived.

The original Employers' Liability Act became effective April 22, 1908. It is to be found in *35 Statutes at Large*, pages 65, 66—Chapter 149. Sections 1 through 5, inclusive, were then practically the same as they are today, but Section 6 then provided for a two year statute of limitations—nothing more. There was then no provisions whatever as to jurisdiction or venue. The only liability in the entire Act at that time was that provided in Section 1 and 2. Jurisdiction and venue were then controlled by the general venue statute in the Judicial Code. On November 6, 1909, the Circuit Court of the Western District of Texas, El Paso Division, decided *Cound v. Atchison, Topeka & Santa Fe Ry. Co.*, 173 Fed. 527. That was an action brought under the 1908 Act originally passed, by a resident of Texas for an injury arising in New Mexico. The defendant was a Kansas Corporation. The Court held that the suit could not be maintained in the Federal Court of Texas, although plaintiff resided in that State, because the defendant was a Kansas Corporation, and under the terms of the general venue act suit could be main-

tained only in the state of incorporation. It was this decision which led to an amendment, effective April 5, 1910, which added the second paragraph of Section 6, which relates to venue and to the concurrent jurisdiction of the State and Federal Courts. The purpose of the amendment was to escape the decision in the Cound case and to make it possible for a plaintiff to sue in the state of his residence, thus relieving the plaintiff of the burden of going long distances with his witnesses to maintain his suit.

The debates in Congress are enlightening. They will be found in the Congressional Record, 61st Congress, Second Session, Volume 45, Part 3, Page 2253. The debate in Congress occurred February 23, 1910. The amendment was sponsored by Congressman Sterling. We quote part of the debates:

Mr. Sterling:

> "Mr. Speaker, this proposed amendment makes three changes in the employers' liability law. As the law is now, suit can be brought only in the district where the defendant is an inhabitant. It has been held by one of the Federal Courts in Texas. This amendment proposes to allow the plaintiff to begin suit in the district where the plaintiff lives, or in the district where the injury occurred, or in the district where the defendant may be found at the time action is commenced * * *."

Mr. Clark of Missouri:

> "Does this bill in any way enlarge the jurisdiction of the United States Court, or curtail the jurisdiction of the State Courts?"
>
> Mr. Sterling: "It does not. It makes it much more convenient for the plaintiff to bring his suit by providing that he may sue in his own district, or in the defendant's district, or where the injury oc-

curred, or where the defendant may be found. As the law is now, a suit can be only brought in the district where the defendant is domiciled. * * *"

Mr. Moore of Pennsylvania:

"Suppose a case where an accident occurred from 100 to 500 miles away from the home of the plaintiff, and all the witnesses resided there. It would be a great hardship upon the plaintiff not to allow him the right to bring the action where the accident occurred and where the witnesses were present."

Mr. Burke of Pennsylvania:

"And that throws light upon the very business that the gentleman has been familiar with, of bringing actions, and would impose as much hardship by bringing actions in remote places under such a change of law, and thus compel the defendant to take his witnesses a very great distance at his very great disadvantage."

Mr. Sterling:

"The plaintiff is likely to bring suit where it is most convenient to him; that is, where the witnesses reside or in the place of injury. That would also be most convenient to the defendant. An injured employee ought not to be required to carry his witnesses a long distance."

The foregoing quotations from the Congressional debate demonstrate that the purpose of 1910 amendment was to eliminate a quirk in the law whereby the plaintiff had theretofore been compelled to take his witnesses for long distances in order to find a Court that would entertain jurisdiction. The purpose was to promote convenience, not create inconvenience. The purpose of the contracts herein involved was to promote convenience and to obviate inconvenience.

Boyd in his Brief relies upon *Duncan v. Thompson*, 315 U. S. 1, which involved a contract in which the employee agreed to return money as a condition precedent to filing suit. Obviously, the purpose of the contract was to exempt the carrier from liability since it was very likely that the employee would be unable to raise and return the money paid to him by the carrier.

The Duncan case was carefully differentiated in *Clark v. Lowden, et al.*, 48 F. Supp. 261 at page 265.

> "* * * It seems clear that in the Duncan case Justice Black while holding that Section 5 pertains to contracts after an injury as well as before, and reversed the holdings of certain State Courts in that regard nevertheless in no way indicated that as used in the Statute, 'liability'—the responsibility of the carrier to respond in damages—embraces 'venue'."

Boyd in his brief relies principally upon *Sherman v. Pere Marquette*, 62 F. Supp. 590, which doctrine is followed in *Fleming v. Husted*, 68 F. Supp. 900; *Peterson v. Ogden Union*, 177 Pacific 744.

In the Sherman case the Court states that an injured employee's right to bring an action in the district in which the carrier shall be doing business, and the carriers' responding duty or liability of submitting to suit in such district, are an adjective right and adjective duty or liability under the Act. If, as the Court said, Sherman could not have made a valid agreement as to venue—an adjective right—in the face of Section 5 of the act, then by the same token he could not have entered into a stipulation with the Pere Marquette for the granting of an extension of time to plead or for any other procedural (adjective) matter.

By that reasoning, an injured employee could never execute a valid release upon an amicable settlement being reached. A release surely exempts the carrier from liability and yet by no stretch of the imagination could Section 5 of the Act be applied to such a final release any more than it could be applied as to a contract concerning venue.

In the Sherman decision, the Court ten times used the phrases "duty" or "liability", thus indicating that the words "duty" or "liability" are synonymous. Congress did not confuse the two expressions, or use them interchangeably, in the Act.

Webster's definition of "liability" is as follows:

> "State or quality of being liable; as the liability of an insurer. That which one is under obligation to pay, or for which one is liable. Specif., in the plural, one's pecuniary obligations, or debts, collectively; — opposed to assets."

His definition of "duty" is as follows:

> "2. That which is required by one's station or occupation; * * * 3. That which a person is bound by moral obligations to do or refrain from doing; that which one ought to do. 4. That which one is bound to render or pay; a material due of any sort; a charge of payment due. 5. Any payment service or other render imposed and recoverable by law or custom; * * *."

Surely, the two words are not interchangeable, and they cannot be used synonymously.

It is significant that Petitioner has not produced one single decision of this Court which holds that after a cause of action has come into being the parties may not waive their statutory venue privileges.

The rule is stated in *17 C. J. S., Contracts*, Sec. 229, pg. 605, as follows:

> "As a general rule venue is not a subject of contract, and except by reason of statute, a stipulation in a contract fixing the venue of an action on the contract as to future litigation is generally held void as contrary to public policy * * *. However, *this rule does not apply to agreements as to accrued causes of action, such agreements being valid and enforceable*, in the absence of misrepresentation, fraud, or mutual mistake. Where no question of public policy is involved, such a contract provision, is, of course, sustained." (Emphasis supplied.)

A-2. VENUE MAY BE WAIVED UNDER THE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT.

In the recent case of *Hoiness v. United States*, 69 S. Ct. 70, this Court had under consideration the provisions of Section 2 of the Suits in Admiralty Act, 46 U. S. C. A., 3741 *et seq.* 41 Stat. 525, which provides that "* * * such suits *shall* be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found" (emphasis ours). The suit was brought in a district other than where the Petitioner resided or where the vessel was at the time suit was filed, and the United States answered to the merits, leaving all questions of jurisdiction to the court. This Court held that notwithstanding the apparent mandatory provision of the statute designating the districts in which such a suit "shall" be filed, it related only to venue which could be and was waived. The decision of this Court was unanimous, and we quote from the opinion as follows:

"The ruling of the District Court that the provisions of Section 2 of the Suits in Admiralty Act, directing where suits shall be brought, were jurisdictional, was in our view erroneous. Those provisions properly construed relate to venue.

The section relates not to libels *in rem* but to libels *in personam*. A similar provision in ¶6 of Tucker Act, 24 Stat. 506, 28 U. S. C. (1946 Ed.) ¶762, 28 U. S. C. ¶1402, 28 U. S. C. A. ¶1402, was held to prescribe venue and hence could be and was waived by failure to object before pleading to the merits. *United States v. Hvoslef*, 237 U. S. 1, 14, 12, 35 S. Ct. 459, 462, 59 L. Ed. 813, Ann. Cas. 1916A, 286; *Thames & Mersey Marine Ins. Co. v. United States*, 237 U. S. 19, 24, 35 S. Ct. 496, 497, 59 L. Ed. 821, Ann. Cas. 1915D, 1087. An analogous provision in the Jones Act, 41 Stat. 1007, 46 U. S. C. ¶688, 46 U. S. C. A. ¶688, was construed the same way. *Panama R. Co. v. Johnson*, 264 U. S. 375, 384, 385, 44 S. Ct. 391, 392, 393, 68 L. Ed. 748. And we recently indicated that that was the correct construction of comparable provisions of ¶2 of the Public Vessels Act, 43 Stat. 1112, 46 U. S. C. ¶782, 46 U. S. C. A. ¶782 (*Canadian Aviator, Ltd. v. United States*, 324 U. S. 215, 224, 65 S. Ct. 639, 644, 89 L. Ed. 901), an act which is similar in purpose and design to the present one. See *American Stevedores v. Porello*, 330 U. S. 446, 452, 67 S. Ct. 847, 850, 851, 91 L. Ed. 1011.

Congress describing the district where the suit was to be brought, was not investing the federal courts 'with a general jurisdiction expressed in terms applicable alike to all of them'. See *Panama R. Co. v. Johnson, supra*, 264 U. S. page 384, 44 S. Ct. 393, 68 L. Ed. 748. It was dealing with the convenience of the parties in suing or being sued at the designated places. The purpose of the Act was to grant seaman relief against the United States in its own courts. The concepts of residence and princi-

> pal place of business obviously can have no relevance when applied to the United States. It is ubiquitous throughout the land and unlike private parties is not centered at one particular place. The residence of principal place of business of the libelant and the place where the vessel or cargo is found may be the best measure of the convenience of the parties. But if the United States is willing to defend in a different place, we find nothing in the act to prevent it."

The language of the venue section of the Federal Employers' Liability Act (45 U. S. C. A. Sec. 56, Sec. 6, 36 Stat. 291) is not mandatory in its wording—it says that such suits "*may* be brought", etc. (emphasis ours) whereas the wording of Section 2 of the Suits in Admiralty Act involved in the Hoiness case was that "such suits *shall* be brought", etc. (emphasis ours). Certainly, the language was much stronger in the Hoiness case than in the instant case.

Venue may be waived by any party including the Government:

> "Venue relates to the convenience of litigants, and therefore may be waived by them. * * * The right to have a case heard in the court of proper venue may be lost unless seasonably asserted. * * * The right to have a case heard in the court of proper venue may be waived by any party, including the government." *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (syllabi L. Ed.), 324 U. S. 635, 636 (65 Sup. Ct. 821, 89 L. Ed. 1241, 1242).

The case of *Neirbo Co., et al. v. Bethlehem*, 308 U. S. 165, was cited in the Herrington opinion. There the Supreme Court said (p. 168), "* * * the locality of a lawsuit—the place where the judicial authority may be exercised—though defined by legislation relates to the con-

venience of litigants and as such is subject to their disposition." Although the Federal Employers' Liability Act was not involved in this Supreme Court decision, the language is surely applicable.

Note 161, 29 U. S. C. A., Sec. 112, contains approximately six and one-half columns of citations to cases holding venue may be waived. The attention of the court is invited to the following Federal decisions:

> "Jurisdiction is the power to adjudicate and is granted by Congress. Litigants may not confer this power on the court by waiver or consent, but the place where the power to adjudicate is to be exercised is venue, not jurisdiction. The venue has relation to the convenience of the litigants and may be waived or laid by consent of the parties." *Iselin v. LaCoste* (5 C. C. A., 1945), 147 F. 2d. 791-795.

> "Venue is quite different from jurisdiction. Venue may be waived, but jurisdiction is vital." *In re Miller's Dresses, Inc.* (Tex., 1932), 1 F. Supp. 378.

> "The rule is well settled that such provisions governing the venue of actions confer a personal privilege upon the defendant which may be waived." *Duval v. Bathrick* (Minn. 1940), 31 F. Supp. 510, 511.

In *Kehaya v. Axton* (N. Y., 1940), 32 F. Supp. 273, 275, venue was held to be waived by the filing of an attachment bond in a State Court.

The alleged right of a Delaware Corporation to dismissal of an action against it was waived by failure to assert the right until a year after the litigation began. *Texas Co. v. Marlin*, (5 C. C. A., 1940) 109 F. 2d. 305.

> "Venue of course may be waived." *Weatherford v. Radcliffe* (S. C., 1945), 63 F. Supp. 107, 109.

The right to be sued only in a certain place is a privilege which may be waived by failure to assert it seasonably. *Canright v. General Finance Corp.* (E. D., 111, 1940) 35 F. Supp. 841, relying on *Neirbo v. Bethlehem Ship-Building Corp.*, 308 U. S. 165. In the Neirbo case, Mr. Justice Frankfurter, who wrote the majority opinion, relied on *Commercial Ins. Co. v. Stone Co.*, 278 U. S. 177, 179, where it was held that venue is a personal privilege which one may assert or waive, at his election, and further held:

> "Being a privilege, it may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct."

The case of the *United States v. DeParcq, et al.*, 164 Fed. 2, 124, was decided by the Circuit Court of Appeals for the Seventh Circuit, and involved a contempt action growing out of *Roland v. Atchison, T. & S. F. Ry. Co.*, *supra*. In that case contracts analogous to those herein involved, and Sections 55-56 were also in issue. The Circuit Court of Appeals held that (page 126):

> "A court may have jurisdiction but no venue, but since venue is a privilege that may be waived when not asserted, the jurisdiction is not ousted; but when the court's venue is challenged and the challenge sustained, and dismissal of complaint follows, as in the instant case, jurisdiction is thereby terminated."

B.

VENUE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT IS A PRIVILEGE, NOT A VESTED RIGHT

The amendment to the Judicial Code, 28 U. S. C. 1404 A. provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a District Court may transfer any civil action to any other district or division where it might have been brought."

The question of whether or not this amendment applied to the Federal Employers' Liability Act was passed upon by this Court in the case of *Ex Parte Collett*, 69 S. Ct., 944, and on the same day held the same way in the case of *Kilpatrick v. T. N. R. Co.*, 69 S. Ct. 953.

As was stated by Mr. Justice Vinson in the Collett case, *supra*.

> "Section 6 of the Liability Act defines the proper forum; Section 1404(a) of the Code deals with the right to transfer an action properly brought. The two sections deal with two separate and distinct problems. Section 1404(a) does not limit or otherwise modify any right granted in Section 6 of the Liability Act or elsewhere to bring suit in any particular district. An action may still be brought in any Court, State or Federal, in which it might have been brought previously."

Obviously, if the venue provisions of Section 6 of the Liability Act create a "liability" which may not be waived by an injured employee, this Court would not have held that Section 1404 (a) of the Judicial Code applies to Liability Act cases, as it did in the Collett and Kilpatrick cases. We think that those cases were correctly decided and, by a parity of reasoning, the venue

provisions of Section 6 do not create a liability, but only privileges for the injured employees' convenience which may waive by contract.

In view of the above decision, giving lower courts the right to transfer causes of action from one district to another, it must necessarily follow that venue is a privilege which can be exercised not only by the parties litigant, but the court, and is not a vested right which cannot be waived, or a liability under the meaning of Section 4 of the Federal Employers' Liability Act.

C.

THE CONTRACTS ENTERED INTO WERE NOT VOID UNDER THE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT

Boyd's cause of action arose on the day that his injuries were sustained. He could have elected to bring his suit in Michigan where both parties resided and where the accident occurred, or in Illinois, or in any other State in which the Grand Trunk was doing business. On the other hand, he could have waited to choose his court until the Statute of Limitations was about to outlaw his right of action. Certainly, he could have made that choice as he actually did several weeks after he was injured.

We cannot tell, of course, what was in Boyd's mind at the time he agreed to confine his action to the Michigan Courts. But we can assume that he felt satisfied with a forum in his home State of Michigan, and to avoid the trouble and expense of bringing himself and his witnesses on over crowded trains and tolerating the impossible hotel situation in Chicago. Notwithstanding that for a valuable consideration plaintiff covenanted to sue only in Michigan and for reasons best known to himself and his coun-

sel, Boyd attempted to rescind his contract, changing his mind about Michigan venue and brought suit in Chicago.

Agreements such as the one signed in this case have been commonly entered into between Railroad Companies and their employees. The benefits of the agreement are mutual. The parties agree to make an honest attempt to settle the claim amicably, and thus avoid unnecessary litigation. The employee receives an advancement. The Railroad Company receives the assurance that it will not be harassed with annoying and vexatious litigation being brought against it at a point far removed from the place of the accident. In view of the distance from the scene of the accident, the residence of the parties, and the residence of the witnesses, and considering manpower shortages, lack of train and hotel accommodations, it becomes extremely burdensome and expensive for the Respondent to have to defend a lawsuit so far from the place of occurrence. The present shortage of doctors, nurses, hospital technicians, etc. also make it virtually impossible for these professional men and women to leave their home communities and their patients to come to points such as Chicago to testify. Hence, the railroads have encouraged agreements such as the instant one, and such agreements are in general use by practically all our railroads throughout the country.

It should be remembered that the agreement in no way impairs the right of Boyd to seek legal redress against the Grand Trunk. All the Federal Courts and State Courts located within the County or District where the injuries were sustained and where he resided, are available to him for filing of a suit. There is no suggestion that the Courts in the County or District in which the accident occurred or in which appellant resided would not accord him the full protection of the law to the same

extent as the Courts in Chicago or any other part of the Country; and if not, this Court has the power to see that they do. The "liability" of the railroad company is exactly the same regardless of the forum in which the case is tried. The agreement does not violate the Federal Employers' Liability Act, nor is it against public policy. It is merely a reasonable restriction as to the venue in which the suit may be commenced.

Various courts have had occasion to pass upon the validity of this type of agreement. The precise question was before the Supreme Court of Minnesota in 1936, in the case of *Detwiler v. Lowden, et al.*, 269 N. W. 367. In that case, a fireman, employed by the defendant railroad, was injured in a collision in the State of Kansas, in which state he also resided. The plaintiff was advanced a sum of money by the defendant, in consideration of which he agreed to attempt in good faith amicably to settle with the defendant for his injuries; and if his claim could not be so adjusted, he covenanted with defendant not to sue it for damages on account of said injuries in any courts sitting outside the state of his residence or outside of the state wherein said injuries occurred.

Notwithstanding such covenant, the plaintiff subsequently brought said suit against the defendant in the State of Minnesota. The Supreme Court of Minnesota upheld the agreement, saying (pp. 369-370):

> "The covenant cannot be held to contravene either section 55 or 56 of title 45 U. S. C. A. (Federal Employers' Liability Act, Sects. 5, 6). It is clear the covenant does not infringe section 55, reading: 'Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter shall to that extent be void.' The covenant does not attempt to

settle the cause of action, nor does it exempt defendants from any liability created by the Act. It is said plaintiff's cause of action is transitory and by section 6 of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 56) he had the privilege of bringing it in any state court, since state courts have concurrent jurisdiction with the federal courts, and in the latter such action may be brought 'in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencement of such action.' There is also a provision that no action under the act brought in a competent state court shall be removed to a federal court. The Restatement of the Law of Contracts, sec. 558 is: 'A bargain to forego a privilege, that otherwise would exist to litigate in a Federal Court rather than in a State Court, or in a State Court rather than in a Federal Court, or otherwise to limit unreasonably the tribunal to which resort may be had for the enforcement of a possible future right of action or the time within which a possible future claim may be asserted is illegal.' It is to be noted that the illegality is as to provisions regarding future causes of action and unreasonable limitations in respect to the tribunal where the causes of action may be litigated, neither of which is present here. The contract concerns an existing cause of action, and certainly the covenant to sue only in the courts sitting in the state where the cause of action arose and where plaintiff then resided is reasonable. We regard the covenant legal on its face, and it should be enforced, if plaintiff knowingly without fraud on the part of defendant signed and delivered the contract containing the covenant.

"The appeal is dismissed." (Italics supplied.)

As was said by Judge Holt in the Detwiler case, just cited, at p. 369, "after plaintiff's cause of action had

accrued, he was free to enter any stipulation he chose with regard to it." His claim could have been settled, and he could have given a release. A release surely "exempts from liability", and yet by no stretch of imagination would Section 5 of the Federal Employers' Liability Act be applied to it. Section 5, we contend, refers to future liabilities, and not accrued causes of action.

Thereafter, the District Court of the United States for the District of Minnesota, First Division, in the case of *Detwiler v. Chicago, R. I. & P. Ry. Co.*, 15 F. Supp. 541, upheld the same agreements and said (p. 543):

> "Plaintiff's motion to strike that portion of the answer of the defendant trustees setting up the so-called contract as a defense upon the grounds that it appears to be void on its face, and the further motion that if said motion be denied that the defendant trustees amend their answer in a certain particular as set out therein, be and the whole thereof is denied."

In 1942, a similar agreement was sustained in the case of *Clark v. Lowden, et al.*, 48 F. Supp. 261, by the District Court of the United States for the District of Minnesota, Second Division. There the injury to the employee-plaintiff occurred in Illinois. The plaintiff subsequently entered into an agreement with the railway, by which, in consideration of an advancement in the sum of $150., he agreed that if litigation became necessary, he would limit the venue to either the state of his residence or the state where the accident occurred. The plaintiff brought suit in Minnesota. The court held the agreement to be a reasonable and valid one, saying (pp. 265-6):

> "* * * if plaintiff and defendants voluntarily agree upon the courts in a certain forum, in the event litigation results, no exemption or derogation

of defendant's liability ensues. It is not pointed out or even urged that defendant's liability for damages for negligence is impaired or in any way diminished in the Illinois forum.

* * *

"Lastly, it may be stated that such contract under all the circumstances is reasonable and in no way infringes upon the right of the employee to obtain complete restitution for damages sustained. Certainly, it cannot be held contrary to public policy during these war times when the carriers are burdened with heavy transportation problems. The time spent by railroad employees traveling long distances to attend trials may increase that burden and in some degree, at least, it may enhance the transportation load which the railroads are obliged to assume. During the last war, the Director General of Railroads promulgated General Order No. 18A on April 18, 1918, which reads:

"General Order No. 18 A, April 18, 1918.

"General Order No. 18, issued April 9, 1918, is hereby amended to read as follows: 'It is therefore ordered that all suits against carriers while under Federal Control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose.'

"This was sustained as a reasonable limitation upon venue in *Alabama & Vicksburg R. Co. v. Journey*, 257 U. S. 111, 42 S. Ct. 6, 66 L. Ed. 154. Not that the existence of transportation problems by reason of the war is determinative of the issues here presented, but it is a factor which admittedly bears upon the reasonableness of the agreement. The curtailment of civilian travel on railroads and the excessive demands made upon the Nation's transportation facilities strongly support defendants' position that, under these circumstances, the covenant

with respect to venue is entirely consonant with public policy.

"It follows, therefore, that the covenant regarding venue should be and is found to be legal and enforcible on its face, and that plaintiff's motion to dismiss the portion of defendant's answer referred to in the notice of motion must be, and the same hereby, is denied. It is further ordered that the issues arising out of Paragraph V of the answer herein and the reply interposed by plaintiff be determined in advance of the other issues in the case."

This type of agreement has been upheld by the District Court for the Western District of Missouri, Western Division, in the case of *Herrington v. Thompson*, 61 F. Supp. 903. There, the plaintiff was injured in Kansas. Subsequently, in consideration of a money advancement, an agreement was entered into in which he covenanted to bring suit only in the State of Kansas. The plaintiff brought his suit in the State of Missouri, a state contiguous to Kansas. The court held that the defendant's motion to dismiss should be sustained, saying (p. 904):

"* * * it may be conceded that by Section 56, 45 U. S. C. A., the plaintiff was accorded the right to bring suit here as well as in the State of Kansas. The point under consideration is whether he contracted away such right.

"Distinction is made by the authorities between executory contracts with respect to venue and those agreements made after the cause of action has accrued. *17 C. J. S.*, Contract, Section 229, p. 605, states the law succinctly as follows: 'As a general rule venue is not a subject of contract, and except by reason of statute, a stipulation in a contract fixing the venue of an action on the contract as to future litigation is generally held void as contrary to public policy, * * *. *However, this rule does not*

apply to agreements as to accrued causes of action, such agreements being valid and enforceable, in the absence of misrepresentation, fraud, or mutual mistake. Where no question of public policy is involved, such a contract provision is, of course, sustained.'

"Turning to the question of public policy, it appears from the authorities that public policy would be inclined to favor the agreement. The Supreme Court, in *Michigan Central v. Mix, et al.*, 278 U. S. 492, 49 S. Ct. 207, 73 L. Ed. 470, declined to permit the maintenance of an action against the Michigan Central where the cause of action accrued in the State of Michigan, but had been brought in the State of Missouri. It is true that there was a question of due process in the case but the court said in discussing a similar ruling in another case: (278 U. S. Loc. cit. 496, 49 S. Ct. 209), 'It was assumed that the carrier had been found within the state. The judgment was reversed on the ground that to compel it to try the cause there would burden interstate commerce, and, thence, would violate the commerce clause.'

"In this case the plaintiff loses no right. It is his privilege to proceed either in the federal or a state court sitting in the State of Kansas to enforce the identical claim asserted here and in a jurisdiction where he had agreed, for a valuable consideration, that he would seek to enforce such claim. Unquestionably, the witnesses reside at Coffeyville, or environs, and while it is not far from Kansas City, yet the convenience of the parties, including the plaintiff himself, would be best served by enforcing his rights in those jurisdictions. As indicated, venue is a personal privilege, and for a good reason, and in accordance with public policy, the plaintiff waived or contracted to waive his privilege to bring his suit here. It was his contract. It does not run counter to the public policy, but, on the contrary, accords with public policy. It is the duty of the

court to enforce the contract made between the parties. That contract was that the venue of the litigation should not be exercised or enjoyed in this jurisdiction.

"In *Harbis v. The Cudahy Packing Co.*, 211 Mo. App. 188, 241 S. W. 960, 962, the court said in reference to venue: 'It is well settled that parties may so contract if they choose.' The Supreme Court did not quash the opinion. *State ex rel. Harbis v. Trimble*, 292 Mo. 333, 238 S. W. 809.

"In *Lidgerwood v. Hale & Kilburn Corporation*, D. C., 47 F. 2d. 318, Loc. cit. 320, the court said 'Until the time arrives when courts are to re-make for parties the contracts which they have made, it seems to me that nothing can be done for plaintiffs in a situation like this.'

"In view of the foregoing, the motion to dismiss should be sustained, and it will be so ordered."

The Honorable Judge Sullivan likewise has sustained this kind of agreement. *Roland v. Atchison, T. & S. F. Ry. Co.*, 65 F. Supp. 630, in the following language (loc. cit., 631):

"The question before me is whether that agreement is a valid agreement. I am convinced that plaintiff voluntarily entered into this agreement and that is binding upon him. In my opinion it does not violate the Federal Employers' Liability Act, nor is it against public policy. Plaintiff's rights have been in no way impaired, and the contract does not impose any unusual or unreasonable restrictions. Plaintiff is not limited to any one court within the State of New Mexico, but he may bring his action in any court in that State which has jurisdiction.

"The motion to dismiss will be sustained, and the complaint dismissed, without prejudice, and with

> the privilege of bringing the action in any court in New Mexico, in which the plaintiff elects to proceed."

It must be remembered that the parties in the instant action did not exempt the Grand Trunk "from liability to suit for the violation of the act". For the sake of reasonable and mutual convenience they voluntarily stipulated and agreed that the question of liability should be litigated as litigation becomes necessary in Federal or State Courts, sitting in Michigan, any one of which would afford both parties a just trial in a forum convenient to both. "Plaintiff's rights have been in no way impaired, and the contract does not impose any unusual or unreasonable restriction." *Roland v. Atchison, T. & S. F. Ry. Co., supra.* He did waive the venue of some courts, but that, being a personal privilege, he had a right to do.

On January 12, 1948, the Supreme Court of the United States handed down an opinion in the case of *Rudy E. Callen v. The Pennsylvania Ry Co.* In that case in consideration of the sum of $250.00, the plaintiff executed a general release of "all claims and demands, which I have, or can, or may have against said Pennsylvania Ry. Co., for or by reason of personal injuries sustained by me." The Court said:

> "The plaintiff has also contended that this release violated Section 5 of the Federal Employers' Liability Act, which provides that any contract to enable any common carrier to 'exempt itself from any liability created by this chapter shall to that extent be void.' Stat. 36, 66, 45 U. S. C. A. 55. It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so, for how much, Congress

has not said that parties may not settle their claims without litigation."

In our opinion, this case is decisive of the proposition that a Railroad Company may lawfully enter into an agreement with an injured employee, which is of mutual benefit to each, is in furtherance of sound public policy, providing that the liability, if any, of the Company under the Federal Employers' Liability Act shall be determined in a Court in the county or district where the accident occurred or in which the plaintiff resided. This is a natural place for such an action to be brought, without such contract being in any respect a device to exempt the Railroad Company from liability. The liability of the Railroad Company to respond in damages for a claimed injury continues to exist regardless of where suit is brought and all such a contract does is to limit the forum to one that is convenient for all parties and their witnesses.

D.

Petitioner contends that the Michigan Supreme Court was in error in not following the decision of the United States Court of Appeals, Sixth Circuit, in the case of *Akerly v. New York Central Railroad Company*, 168 F. (2nd) 812, which decision was handed down approximately two weeks before the Michigan Supreme Court decided the instant case.

The weight of authority is to the effect that the Michigan Court was not bound by the decisions of the United States District Court or Circuit Courts of Appeal. The leading case on this point is *Home Insurance Company of New York v. Northern Pacific Railway Company*, 147 A. L. R., 849, at page 855, a Washington Supreme Court decision.

"When a federal statute is construed by a United States Court of Appeals, such construction is entitled to great weight with us when the same statute is involved in a case we are considering, *but it is not binding on us if we do not deem it logical or sound.* There are some cases and texts which state broadly that the decisions of 'federal courts' construing federal statutes are binding on the state courts, but an examination of them will disclose that what is referred to is the United States Supreme Court, not the federal courts generally. We have found no case in which the question has been squarely presented holding that decisions of the inferior federal courts on any federal question are binding on the state courts, or anything more than persuasive and entitled to great weight." (Italics supplied.)

The Federal Statute (Sec. 56) gives State Courts and Federal Courts concurrent jurisdiction. We contend that while the decisions of the United States Supreme Court are binding on the Michigan State Supreme Court, the decisions of the lower federal courts are not, and the Michigan Court could exercise its own discretion and judgment in the matter at issue.

It is interesting to note in this respect that in the home Federal District Court of the attorneys for Appellant, which is the Northern District of Illinois, Eastern Division, said court decided the identical question on two different occasions within six months, each time arriving at a different conclusion. On October 3, 1945, *Sherman v. Pere Marquette, supra,* was decided and it was held that contracts of this character are void. On April 17, 1946, *Roland v. Santa Fe Railroad, supra,* was decided and it was then held that contracts of this character are valid. The query naturally presents itself whether or not *Roland v. Santa Fe* overruled *Sherman v. Pere Marquette,* or whether the Judge deciding the Roland case

refused to be bound by the previous decision. Certainly, if the Judges of a Federal District Court cannot agree and are not bound by their own decisions, a State Court must necessarily exercise its own discretion, which the Michigan Court did in this instance.

E.

The filing of the suit in the District Court of the United States for the Eastern District of Michigan, Southern Division, was in accordance with applicant's contractual obligations (R. 19, 20, 21), and the Orders of the Supreme Court of Michigan (R. 9, 97), and is tantamount to an abandonment by Appellant of his suit in Illinois. The Federal Court case in Michigan can proceed to trial and final determination of every issue in it (which includes every issue in the Illinois case) regardless of whether a Writ of Certiorari was issued in this proceeding or of the ultimate determination of the issue presented by Appellant.

It is respectfully submitted that this renders the case moot.

C. M. Patten & Co. v. United States, 289 U. S. 705, 53 S. Ct. 687;
Hargis v. Bradford, 283 U. S. 781, 51 S. Ct. 342.

This Court will not issue a Writ of Certiorari or otherwise proceed to an adjudication where there is no subject matter on which the judgment of the Court can operate.

Montgomery Ward & Co. v. U. S., 326 U. S. 690;
Ex Parte Baez, 177 U. S. 378, 390;
Brownlow v. Schwartz, 261 U. S. 216, 217;
Chandler v. Wise, 307 U. S. 474, 477-478;

Director of Prisons v. Court of First Instance of the Province of Cavite, 239 U. S. 633;
Jones v. Montague, 194 U. S. 147;
Mills v. Green, 159 U. S. 651, 653.

This is so notwithstanding the contention that a determination of the issue is necessary because of contemplated future cases.

Commercial Cable Co. v. Burleson, 250 U. S. 360.

The Court is without power to decide moot questions or give advisory opinions.

St. Pierre v. United States, 319 U. S. 41.

And the Court should not pronounce judgment on abstract questions even if its opinions might influence future actions under like circumstances.

Richardson v. McChesney, 218 U. S. 487, 492.

A similar principle was involved in the recent case of *Brotherhood of Locomotive Engineers, et al. v. United States*, 69 S. Ct. 137, and this Court denied Certiorari upon Respondent's objection that settlement between the parties of the question at issue rendered the case moot.

It is no answer for Appellant to say that he may commence as many actions as he may wish in different permitted jurisdictions. The least that can be said is that the filing of the case in Michigan demonstrates that Appellant is willing to have his case tried in Michigan if it is reached for trial first and that being true the suggestion leads to the inevitable conclusion that there is no substance to it.

CONCLUSION

Respondent respectfully urges that the relief asked for by Appellant be denied, and that the decision of the Supreme Court of Michigan and its Judgment be affirmed and approved.

Respectfully submitted,

H. VICTOR SPIKE,
Attorney for Respondent.
Business Address:
441 East Jefferson Avenue,
Detroit 26, Michigan.

GEORGE F. GRONEWOLD,
Of Counsel.
Business Address:
1514 Security National Bank Bldg.,
Battle Creek, Michigan.